

Law Reform Commission of Western Australia

Aboriginal Customary Laws

Project 94

DISCUSSION PAPER

(December 2005)

The Law Reform Commission of Western Australia

Commissioners

Chair Ms AG Braddock SC, BA in Law (Cambridge)

Members Ms ID Petersen, LLB (Western Australia)
Dr CN Kendall, BA (Hons) LLB (Queen's)
LLM SJD (Michigan)

Executive Officer Ms HJ Kay, LLB LLM (Western Australia)

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Law Reform Commission of Western Australia
Level 3, BGC Centre
28 The Esplanade
Perth WA 6000
Australia

Telephone: 011+61+8+9321 4833
Facsimile: 011+61+8+9321 5833

Email: lrcwa@justice.wa.gov.au
Website: www.lrc.justice.wa.gov.au

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Terms of Reference

Recognising that all persons in Western Australia are subject to and protected by this state's legal system; and there may be a need to recognise the existence of, and take into account within this legal system, Aboriginal customary laws:

The Law Reform Commission of Western Australia is to enquire into and report upon Aboriginal customary laws in Western Australia other than in relation to Native Title and matters addressed under the *Aboriginal Heritage Act 1972* (WA).

Particular reference will be given to:

1. how those laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by those laws and how they cease to be bound; and
3. whether those laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
 - (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
 - (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;

- (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
- (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

For the purposes of carrying out this inquiry, the Commission is to have regard to:

- matters of Aboriginal customary law falling within state legislative jurisdiction including matters performing the function of or corresponding to criminal law (including domestic violence); civil law (including personal property law, contractual arrangements and torts); local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure;
- relevant Commonwealth legislation and international obligations;
- relevant Aboriginal culture, spiritual, sacred and gender concerns and sensitivities;
- the views, aspirations and welfare of Aboriginal persons in Western Australia.

Peter Foss QC MLC
2 December 2000

Acknowledgements

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The Commission thanks its Executive Officer, Heather Kay, for her work in coordinating this reference and its publication designer, Cheryl MacFarlane, for her work in preparing this paper for publication. The Commission's research for this reference was aided by its dedicated research team: thanks to Jeff Atkinson, Olivia Barr, Dr Rebecca Collins, Julian Hosgood, Sophie Johnson, Yuki Kobayashi, Alana McCarthy, Suzie Ward, Carla Yazmadjan and, in particular, to the Commission's Executive Assistant, Sharne Cranston. In addition, the Commission acknowledges the assistance provided by the many individuals, organisations and agencies that were consulted in relation to specific parts of this reference.

The Commission wishes to acknowledge the efforts of past chairmen the Hon. Justice Ralph Simmonds and Wayne Martin QC, who guided the Commission's work on this reference during their incumbency. The Commission is particularly indebted to the work of the Special Indigenous Commissioners for this reference—Professor Michael Dodson and Mrs Beth Woods—and to the members of the Aboriginal Research Reference Council. A special vote of thanks is extended to Dr Harry Blagg and Professor Neil Morgan from the Crime Research Centre at the University of Western Australia for their assistance from 2001–2004 as Research Directors for this reference and to Ms Cheri Yavu-Kama-Harathunian for her work as Project Manager from 2001–2003.

Finally, the Commission wishes to thank the Indigenous people of Western Australia who were consulted for this reference and who entrusted their stories and their law to the Commission for the purposes of this project.

Background Papers

When referring to the background papers produced for the Aboriginal Customary Laws project, reference is made to the papers which were published individually throughout 2004–2005. The Commission has since produced one volume containing all of the 15 Papers. (For a complete list of the Background Papers, see below p 14.) The Commission wishes to thank each of the consultants who were commissioned to write the background papers.

Foreword

This project commenced in late 2000, upon receipt of the reference from the then Attorney-General, the Hon. Peter Foss QC and has been a major focus for the Commission since that time. The way in which we have gone about researching and developing the project is set out in the introduction and methodological overview which follow. They describe in detail our approach to our terms of reference, our concept of the task and the way in which we have gone about addressing it.

During the review of the civil and criminal justice system, new methods of law reform work were adopted, involving extensive community consultation. In this project, inquiring into Aboriginal customary laws in Western Australia, we have used and extended those methods in order to hear particularly from the Aboriginal people of this state.

It was obvious that an approach to research specific to and appropriate to Aboriginal people and the breadth of the project was required. The resulting methods are detailed in Part I. What was critical was to involve Aboriginal people throughout and to that end the Commission sought advice from respected Aboriginal sources and consulted widely from the outset. The result was a new and original process, involving setting up a 'Research Reference Council' of Aboriginal people, whose knowledge and connections spanned not only Western Australia, but also moved across the whole country. They were a source of advice, introductions and cautions. The Special Commissioners, Professor Michael Dodson and Mrs Beth Woods, brought further expertise and experience to the project. Their knowledge and connections have been crucial, particularly during the consultative visits to communities around the state. With their help, in discussions with the various communities, we elicited many views, stories and strong criticisms. These were then distilled into summaries by Research Directors Professor Neil Morgan and Dr Harry Blagg, respecting the confidentiality where appropriate, but rendering the themes raised by the people loud and clear. The results are published on the Commission's website.

The terms of reference for this project are broad, covering the existence and operation of Aboriginal

customary laws, the people affected by that law, whether it should be recognised and, if so, 'to what extent, in what manner and on what basis'. The terms of reference are not limited to obvious areas in which Western Australian law and customary laws have been known to clash. The Commission is required to have regard to 'the views aspirations and welfare of Aboriginal persons in Western Australia'. In this process, we have found that some topics generated as many questions as they did answers, calling us to research deeper into the operation of laws in the lives of Aboriginal people. It may be that this is a feature of committed law reform. This Discussion Paper is a reflection of that process. For all these reasons it has taken time to reach this point of publication.

In many ways, this project has been a humbling experience. We have seen the history of this state reflected in the conditions and life experiences of Aboriginal people today. To realise that these discoveries are nothing new, or necessarily unknown, tells us something else. The juxtaposition of separate worlds and different ways of life in our modern state remains astounding. This Discussion Paper will serve to illustrate features of those worlds and lives now in Western Australia. We have attempted to present it in sections that reflect the main areas of interaction between people and law in a general sense. It is, to a great extent, organised around western legal concepts. This is an unavoidable pragmatic approach to the breadth of the subject. It was not necessarily the way issues were presented in the consultations or discussions.

Aboriginal people in Western Australia today are relatively few in number. That in no way diminishes the importance of this reference for all Western Australians. The way in which Aboriginal people live within the wider framework of our society is a reflection upon the whole of that society. Whether and how we recognise their position and their law is a matter of equity. The hardships and injustices that arise because of lack of knowledge, lack of understanding, inflexibility of thought and simple prejudice are numerous, complex and difficult to address.

We have drawn upon many resources and people for their knowledge and experience as much as their academic work. Most importantly, we have attempted to seek out the views of the Aboriginal peoples concerned. There are varied and widely distributed Aboriginal communities in Western Australia. We are very conscious that we have not spoken to everybody. We have not been able to visit every community. Inevitably there will be things that have not been brought to our attention. The purpose of this Discussion Paper is to invite critical response. We need to be told where we have missed an important piece of information or point of view. We want to hear the arguments for and against the proposals at this stage and we encourage wide discussion on all topics in this Paper. On some specific questions, we have not been able to form a view, either for lack of specific material to date or from a consciousness that there are more issues that need to be articulated. We particularly welcome contributions on these questions.

This Discussion Paper has been structured and the format designed to enable and encourage people to find their way to sections of particular interest. It is not necessary to read the whole document to be able to respond. We would like readers to feel able to make specific comments on any proposal without any obligation to respond to the whole. This Discussion Paper, the background papers and thematic summaries

are available on our website and we welcome responses in electronic form.

My fellow Commissioners Ilse Petersen and Dr Chris Kendall and I are indebted to everybody who has contributed to the research, preparation and writing of this Discussion Paper. It has been an exciting and stimulating endeavour. Many talented individuals have contributed enthusiastically to the work. Our writers, Dr Tatum Hands, Victoria Williams and Danielle Davies have produced excellent material and have shown us all how to cooperate, often under difficult circumstances. I particularly want to thank our Executive Officer, Heather Kay, and our Executive Assistant, Sharne Cranston who have organised, coordinated and acted as a liaison point for so many people.

Our greatest thanks are due to all those people who came to our meetings, sometimes travelling considerable distances, and shared their views and experiences. The generosity of the Aboriginal people of this state, in their willingness to sit with us, talk to us and challenge us, cannot be overstated. Without them, the time they gave us and the tolerance they have shown, this work, in the form it now appears, would have been impossible.

AG Braddock SC
Chair
December 2005

Introduction

Between 1997 and 1999, the Law Reform Commission of Western Australia (the Commission) conducted a comprehensive review of the Western Australian justice system during which it received in excess of 1,600 public submissions.¹ A number of those submissions called for more equitable treatment of Indigenous Australians under the law. The Commission determined that the complex relationships between Indigenous peoples, their customary laws and the broader Western Australian justice system, as well as the cultural sensitivities involved in dealing with these issues, merited an entirely new reference.

The Commission approached the then Attorney-General, the Hon. Peter Foss QC, with the proposal for a new reference to investigate whether there may be a need to recognise the existence of Aboriginal customary laws and have regard to those laws within the Western Australian legal system. Following consultation with Aboriginal² groups and communities around the state the Attorney-General and the Commission settled the terms of reference and on 2 December 2000 the matter was formally referred to the Commission for investigation.³



Scope of the Reference

The Attorney-General asked the Commission to 'inquire into and report upon Aboriginal customary laws in Western Australia'. The Commission's terms of reference for this project were wide-ranging, giving the Commission the freedom to investigate all areas of Aboriginal customary laws in Western Australia other than native title issues and matters addressed under the *Aboriginal Heritage Act 1972* (WA). In its research for this reference, the Commission was particularly directed to inquire into:

1. how Aboriginal customary laws are ascertained, recognised, made, applied and altered in Western Australia;
2. who is bound by Aboriginal customary laws and how they cease to be bound; and
3. whether Aboriginal customary laws should be recognised and given effect to; and, if so, to what extent, in what manner and on what basis, and in particular whether:
 - (a) the laws of Western Australia should give express recognition to Aboriginal customary laws, cultures and practices in the administration or enforcement of Western Australian law;
 - (b) the practices and procedures of the Western Australian courts should be modified to recognise Aboriginal customary laws;
 - (c) the laws of Western Australia relating to the enforcement of criminal or civil law should be amended to recognise Aboriginal customary laws; and
 - (d) whether other provisions should be made for the identification and application of Aboriginal customary laws.

1. Law Reform Commission of Western Australia, *Review of the Criminal and Civil Justice System in Western Australia*, Project No 92 (1999).
2. For the purpose of this paper, reference to Aboriginal people includes reference to Torres Strait Islander people; however, the Commission notes that, according to the 2001 Census, there are less than 900 Torres Strait Islanders currently residing in Western Australia.
3. The Commission would also like to acknowledge the support of current Attorney-General, the Hon. Jim McGinty, in respect of this reference.



Whilst focusing primarily on matters of Aboriginal customary law falling within state legislative jurisdiction (including matters performing the function of, or corresponding to, criminal law; civil law; local government law; the law of domestic relations; inheritance law; law relating to spiritual matters; and the laws of evidence and procedure), the Commission was also to have regard to relevant Commonwealth legislation and international obligations. In its inquiry into these matters the Commission was further directed to have regard to relevant Aboriginal cultural, spiritual, sacred and gender concerns and sensitivities; and the views, aspirations and welfare of Aboriginal people in Western Australia.

It is important to note that, while the Commission must 'have regard to' the matters referred to in the previous paragraph, it is not required to report on each of those matters. In taking decisions about the areas of law upon which to concentrate its research efforts, the Commission took advice from key Indigenous advisors and its Indigenous Special Commissioners. The Commission was also guided by the concerns and issues raised by Aboriginal communities during its extensive public consultations throughout Western Australia. The consultations revealed certain matters not expressly specified in the Commission's terms of reference but which nonetheless fell within the Commission's mandate

as matters relevant to 'the views, aspirations and welfare of Aboriginal persons in Western Australia'. These matters are discussed in more detail in Part II below.

Previous Inquiries

This is not the first inquiry on the recognition of Aboriginal customary laws undertaken by an Australian law reform agency. The current study was preceded by important inquiries undertaken by the Australian Law Reform Commission during the 1980s and, more recently, the Northern Territory Law Reform Committee. It is not the intention of the Commission to replicate the work of these inquiries or reproduce their findings in full here; however, where relevant, this Discussion Paper refers to the research and recommendations—and should generally be considered in the context—of these previous inquiries.

It is convenient here briefly to discuss these inquiries and set out their principal findings. A more detailed consideration of certain elements of these inquiries will be found in subsequent chapters.

Australian Law Reform Commission

In February 1977, the Australian Law Reform Commission (ALRC) received a broad reference to 'inquire into and report upon whether it would be desirable to apply either in whole or in part Aboriginal customary law to Aborigines, either generally or in particular areas or to those living in tribal conditions only'.⁴ Specifically, the ALRC was asked to report on:

- (a) whether, and in what manner, existing courts dealing with criminal charges against Aborigines should be empowered to apply Aboriginal customary law and practices in the trial and punishment of Aborigines;
- (b) to what extent Aboriginal communities should have the power to apply their customary law and practices in the punishment and rehabilitation of Aborigines; and
- (c) any other related matter.

Although the scope of the inquiry was virtually unlimited, the ALRC decided to exclude consideration of cultural heritage and self-determination as well as the laws of real property and intellectual property. The ALRC began

4. Terms of reference given to the Australian Law Reform Commission (ALRC) by federal Attorney-General, Robert Ellicott, on 9 February 1977.
5. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986).

what was to become a nine-year process of consultative fieldwork and research across Australia during which it published 15 research papers on specific areas of the reference. The ALRC's research work culminated in 1986 in a comprehensive two-volume report⁵ containing numerous recommendations and draft legislation for the recognition of Aboriginal customary laws in Australia.

The principal findings of the ALRC were that:

- Aboriginal customary laws existed in traditional Aboriginal societies and, despite numerous changes, forms of these customary laws continue to exist.
- Aboriginal customary laws should be understood broadly rather than narrowly and need not be precisely defined.
- Aboriginal customary laws should be recognised, in appropriate ways, by the Australian legal system.
- The recognition of Aboriginal customary laws must occur against the background and within the framework of the general law.
- As far as possible, Aboriginal customary laws should be recognised by existing judicial and administrative authorities, avoiding the creation of new and separate legal structures (unless the need for these is clearly demonstrated).
- The issues of the extent and method of recognising Aboriginal customary laws need to be considered separately from any arguments about the federal system.
- Recognition of Aboriginal customary laws may take different forms; however, as a general principle, codification or direct enforcement are not appropriate forms of recognition of Aboriginal customary laws.

The ALRC report made specific recommendations in relation to appropriate recognition of Aboriginal customary law in respect to: traditional marriages; distribution of property upon death; Aboriginal child custody, fostering and adoption; criminal law and sentencing; evidence and procedure; police

investigation and interrogation; local justice mechanisms for Aboriginal communities; and hunting, fishing and gathering rights. Volume Two of the report appended draft legislation for the recognition of Aboriginal customary laws in many of these areas.⁶ The ALRC also recommended changes to state government policies in relation to prosecutorial discretion, local justice mechanisms and policing.

Despite strong support from Aboriginal organisations, there has been limited administrative and legislative implementation of the ALRC's recommendations in the decades since it published its report. In 1992 the Royal Commission into Aboriginal Deaths in Custody recommended that the federal government produce a progress report on the status of implementation of the ALRC's recommendations – a task which was completed by the Office of Indigenous Affairs in 1995.⁷ That report indicated that there had been partial legislative implementation of some of the recommendations at the federal level, particularly in relation to the interrogation of Aboriginal offenders and the need for interpreters.⁸ The progress report noted further administrative changes in various government departments which had implemented aspects of the ALRC's recommendations. At the state level the ALRC's recommendations have been given legislative form in some jurisdictions in respect to recognition of traditional marriages for the purposes of adoption⁹ and the implementation of the Aboriginal child placement principle which was appended to the ALRC's draft Bill.¹⁰

It is important to note (as the Aboriginal and Torres Strait Islander Commission (ATSIC) did in its 1999 report to the United Nations) that 'to some extent the work of the ALRC has been overtaken by events'.¹¹ Of these events the High Court's 1992 decision in *Mabo v Queensland [No 2]*,¹² which recognised a limited right of communal native title to land consistent with the laws and customs of Indigenous peoples, and the subsequent passage of the *Native Title Act 1994* (Cth) have been the most significant. In light of these developments and the time elapsed since the publication of the ALRC report, ATSIC has noted the

6. Aboriginal Customary Laws (Recognition) Bill 1986.

7. Office of Indigenous Affairs of the Department of Prime Minister and Cabinet, *Aboriginal Customary Law: Report on Commonwealth implementation of the recommendations of the Australian Law Reform Commission* (1995).

8. See <<http://www.alrc.gov.au/inquiries/title/alrc31/implemntation.htm>>.

9. *Adoption of Children Act 1965* (NSW); *Adoption of Children Act 1964* (NT); *Adoption of Children Act 1988* (SA); *Adoption of Children Act 1984* (Vic). As discussed in Part VII, Western Australia was the last state to legislatively implement the Aboriginal child placement principle in 2002–2004. See below 'Aboriginal Child Custody Issues: Guiding Principles', below pp 341–42.

10. *Community Welfare Act 1983* (NT); *Children (Care and Protection Act) 1987* (NSW); *Adoption of Children Act 1988* (SA); *Children (Guardianship and Custody) Act 1984* (Vic); *Adoption of Children Act 1964* (Qld).

11. Aboriginal and Torres Strait Islander Commission (ATSIC), *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the Nations Convention on the Elimination of all Forms of Racial Discrimination* (February 1999).

12. (1992) 175 CLR 1 (hereafter cited as '*Mabo*').

importance of re-examining and progressing the ALRC's recommendations.¹³

Northern Territory Law Reform Committee

In October 2002 the Northern Territory Law Reform Committee (NTLRC) was asked to 'inquire into the strength of Aboriginal customary law in the Northern Territory'¹⁴ and, in particular:

To report and make recommendations on the capacity of Aboriginal customary law to provide benefits to the Northern Territory in areas including but not limited to governance, social well being, law and justice, economic independence, wildlife conservation, land management and scientific knowledge.¹⁵

The inquiry was co-chaired by the Hon. Austin Asche QC and Yananyumul Mununggurr; a sub-committee of eight Indigenous members and eight legal experts was convened to assist the inquiry. Because the NTLRC was given only eight months to conduct the inquiry and report to government, the inquiry was necessarily limited in its scope.

The NTLRC prepared a series of four background papers on general issues, including the recognition of Aboriginal customary law and the conduct of Aboriginal customary law in the Northern Territory. The NTLRC also consulted with a wide cross-section of the community and conducted consultative visits to a number of Aboriginal communities across the Territory. The primary findings of the NTLRC inquiry were:

- That 'Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory'¹⁶ and that it defines the identity of Aboriginal people, their rights, responsibilities and relationships to others.
- That the issues facing individual Aboriginal communities and the traditional laws of each Aboriginal community are different.¹⁷
- That Australian law cannot be completely excluded and that it should, where appropriate, work in conjunction with Aboriginal customary law.¹⁸

In making these findings the NTLRC acknowledged the difficulty of attempting to incorporate Aboriginal customary law into the Australian legal system by legislative means.¹⁹ It suggested that customary law would be better left to the interpretation of Aboriginal people and that Aboriginal people should be empowered to conduct their communities according to their customary laws.²⁰ The NTLRC made 12 specific recommendations to assist this outcome including that government should

- adopt a whole-of-government approach to the recognition of Aboriginal customary laws such that services and programs support and complement each other;
- assist Aboriginal communities to develop law and justice plans to incorporate Aboriginal customary law into community governance;
- properly fund initiatives and pilot programs for the implementation of law and justice plans;
- establish separate consultative inquiries into the issues of promised marriages and 'payback'; and
- develop strategies to increase the participation of Aboriginal people in the justice system and allow for the input of communities in the sentencing of offenders.

It is perhaps too early to judge the success of implementation of the recommendations made in the



13. ATSIC, *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the Nations Convention on the Elimination of all Forms of Racial Discrimination* (February 1999).

14. Terms of reference given to the Northern Territory Law Reform Committee (NTLRC) by Northern Territory Attorney-General Dr Peter Toyne on 16 October 2002.

15. Ibid.

16. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 13.

17. Ibid 6.

18. Ibid 15.

19. Ibid 11.

20. Ibid 12. Subject, of course, to the proviso that Aboriginal customary law should be recognised 'consistent with universally recognised human rights and fundamental freedoms'.

NTLRC report although a number of initiatives responding to the recommendations have been undertaken, particularly in relation to law and justice issues.²¹ It is important to note that the recent NTLRC inquiry was preceded in that jurisdiction by a 1992 discussion paper of the Sessional Committee of the Northern Territory Legislative Assembly on Constitutional Development wherein the legal and constitutional recognition of Aboriginal customary laws was considered.²² The Sessional Committee's final report on a draft Constitution for the Northern Territory recommended express recognition of 'Aboriginal customary law as a source of Northern Territory law on a par with the common law'.²³ Although little has yet been done of a formal nature²⁴ in respect of the recognition of Aboriginal customary laws in the Northern Territory, there has been a consistent willingness to review the question by successive governments.²⁵

Structure of this Discussion Paper

Whilst the Commission is mindful that the chosen structure of this Discussion Paper may reflect a more Western conception of law than is commonly found in Aboriginal society, the Commission's Terms of Reference require it to consider Aboriginal customary laws in the context of the current Western Australian legal system – a system which reflects this state's colonial heritage. To enhance the opportunities for recognition of Aboriginal customary law within that system, the Commission has chosen to structure this Discussion Paper in a way that legislators and government will more readily understand.

This Discussion Paper is presented in ten parts. Part I provides an overview of the Commission's research methodology and management of the reference. Part II provides some background and statistical information on Aboriginal peoples in Western Australia and introduces some general findings of the Commission

from its consultative visits to Western Australian Aboriginal communities. Part III addresses the question, 'What is customary law?' and discusses issues and methods of recognition of Aboriginal customary law in the Western Australian context. Part IV examines the concept of Aboriginal customary law in the international arena, including in the human rights context. Part V deals with the Commission's substantive investigation into the interaction of Aboriginal people and the criminal justice system and discusses the opportunities for recognition or expression of Aboriginal customary law within that system. The discussion in Part VI deals with Aboriginal customary law and the civil law system, while Part VII examines the significance of Aboriginal customary law in the family context. The recognition of customary law in relation to hunting, fishing and gathering, and associated land access issues is examined in Part VIII; while Part IX examines Aboriginal customary law in relation to rules of evidence and court practice and procedure. Part X explores Aboriginal community governance and discusses what is being done (and what more can be done) to maximise Aboriginal peoples' participation in the decision-making processes that affect their daily lives.

Proposals for Reform

Throughout this Discussion Paper, the Commission makes a number of proposals for reform. As well as proposals for specific amendment of certain legislation, the Commission has made proposals relating to enhancement of service delivery to Aboriginal communities and improvement of the practices of government agencies, courts and public services. In cases where the State of Western Australia lacks legislative jurisdiction to make meaningful changes, the Commission has proposed that the government lend its support to the relevant recommendations of Commonwealth bodies and to the efforts of the Commonwealth government in respect of federal legislative change. The Commission has also invited

21. Coates R, 'Towards Mutual Benefit: The inquiry into customary law in the Northern Territory of Australia and other initiatives' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, April 2004).
22. Sessional Committee on Constitutional Development (NT), *Recognition of Aboriginal Customary Law*, Discussion Paper No 4 (August 1992).
23. From *Foundations for a Common Future*, the Sessional Committee's commentary to the final draft Constitution (November 1996) cited in NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 9.
24. Although it is acknowledged that within its legislative mandate, the Northern Territory has provided for the recognition of traditional Aboriginal marriages for certain purposes, such as for adoption (*Adoption Act 1994* (NT) ss 8, 11) and distribution of property upon death (*Administration and Probate Act 1979* (NT) s 6). Further, the Northern Territory (through the Commonwealth government of the time) ostensibly 'led the way' in respect of the recognition of Aboriginal land rights in Australia. See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and *Aboriginal Land Act 1978* (NT). The source of law provision was put to referendum in 1998 along with a draft of the proposed Constitution of the new State of the Northern Territory. See discussion in Part III, 'Constitutional recognition of Aboriginal customary law as a distinct "source" of law', below pp 58–59.
25. Consider, for instance, the efforts of former Attorney-General Steve Hatton MLA to develop substantive mechanisms for the recognition of Aboriginal customary law in the Northern Territory: Hatton S, 'The Recognition of Aboriginal Customary Law: A Concept Proposal for the Northern Territory' (Paper presented to the Standing Committee of Attorneys-General, March 1996). See also the work on Indigenous community governance undertaken by the Northern Territory Standing Committee on Legal and Constitutional Affairs (2002).

submissions on matters in which it feels, as yet, unable to make a firm proposal for reform. These are generally in areas where strong conflicting views may have been expressed by Aboriginal people during the Commission's consultations or where the Commission has received insufficient input from Aboriginal people or other stakeholders to reach a conclusion.

It is important to note that, although the Commission has attempted to do justice to Aboriginal customary law in all areas relevant to its Terms of Reference, there may be discrete areas of interaction between Aboriginal customary law and Western Australian law of which the Commission is yet unaware. There are also undoubtedly pertinent studies that have been undertaken by individuals, government departments or organisations but have not come to the attention of the Commission. In some cases, the Commission has been refused access to documents that have come to its attention for reasons of confidentiality or embargo. In other cases, relevant departmental reports had not been finalised at the time of writing and therefore could not be included in this Discussion Paper. The Commission will revisit each area prior to publishing its Final Report and invites submissions on matters that are not included in this paper or on relevant studies that may assist the Commission in this task.

Submissions to the Law Reform Commission

The Commission invites interested parties to make submissions in respect of the proposals for reform contained in this paper. Submissions will assist the Commission in formulating its final recommendations to the Western Australian Parliament for reform of the law in this area. All submissions will be considered by the Commission in its Final Report on Project No 94.

Submissions may be made by telephone, fax, letter or email to the address below. Those who wish to request a face-to-face meeting with the Commission may telephone for an appointment.

Law Reform Commission of Western Australia
Level 3, BGC Centre
28 The Esplanade
Perth WA 6000

Telephone: (08) 9321 4833
Facsimile: (08) 9321 5833
Email: Ircwa@justice.wa.gov.au

PART I

Methodological Overview

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Methodological Overview

Managing the Reference

As a result of a restructure of the agency in 1997, the Commission no longer employs full-time research officers and project managers. Instead, through a tender process, the Commission engages the services of consultants who have expertise in the particular area that the Commission is investigating. These consultants assist the Commission in implementing research strategies and collecting the data necessary to properly inform the Commission in making its recommendations. In respect of the current reference—where cultural protocols necessitated a degree of Aboriginal involvement in the work—this process of external tendering has been particularly beneficial. Importantly, this process has allowed the Commission to ensure critical Aboriginal involvement in the reference from an early stage.

The Project Team

The Commission tendered for project management of the reference in January 2001 and, following culturally appropriate consultation and tender evaluation,¹ the successful tenderer, the Crime Research Centre (CRC) at the University of Western Australia, was appointed to form the Project Team. Upon the recommendation of the CRC, Ms Cheri Yavu-Kama-Harathunian (an Aboriginal woman of the Cubbi Cubbi clan of North Queensland) was appointed to the position of Project Manager in March 2002. Ms Yavu-Kama-Harathunian came to the project with significant experience working in the justice system, including in Western Australia's correctional services. Two part-time Research Directors—Dr Harry Blagg (a criminologist/ethnographer) and Professor Neil Morgan (a legal academic)—were appointed to assist the Project Manager and to provide legal, policy and research coordination services from multi-disciplinary perspectives.

Special Commissioners

The Commission is constituted by three part-time Commissioners drawn from academia, government and private legal practice. However, in cognisance of the cultural sensitivities involved in a project of this nature, the Commission asked the Attorney-General to appoint two Indigenous Special Commissioners to provide advice and support to the Commission and its Project Team. In June 2002, Professor Michael Dodson and Mrs Beth Woods were appointed as Special Commissioners for the Aboriginal customary laws project. Both Special Commissioners are highly regarded by their peers and have held important positions in Aboriginal affairs and government agencies. In addition to advising the Commission on certain matters relating to the reference, the Special Commissioners travelled with the Commission to conduct consultations with Aboriginal communities around the state.



1. The Commission appointed a five-member Aboriginal advisory panel to oversee the tender evaluation process.

Aboriginal Research Reference Council

Upon the advice of the Project Team, the Commission appointed an Aboriginal Research Reference Council (ARRC) to assist in the project and provide advice on culturally appropriate processes for the conduct of the reference and for the collection of data. The ARRC is made up of highly respected members of the Western Australian community, representing a diverse group of Aboriginal people who work in health, education, legal, community-based and government organisations.² The ARRC also includes members who have traditional law backgrounds and strong connections to the regions.

Respect for Cultural Protocols, Practices and Information

Memorandum of Commitment

One of the first issues upon which the Commission sought advice from the ARRC was the design of appropriate cultural respect protocols to guide the Commission in the conduct of its work (particularly its field work) on the reference. With the assistance of the ARRC and the Project Team, the Commission formulated a document of undertaking to be distributed to Aboriginal communities to assure the people of the Commission's commitment to conduct its inquiry with integrity and with proper respect for cultural protocols and practices. Together with the ARRC and the Project Team, the Commission executed a Memorandum of Commitment in the following terms:

The Law Reform Commission of Western Australia is committed to:

- (1) Working honestly and with integrity with Aboriginal people.
- (2) Entering Aboriginal country with permission and with respect for, and honour of, the local cultural protocols and practices of the Aboriginal people of that country.
- (3) Leaving Aboriginal country with permission and with respect for, and honour of, the local cultural protocols and practices of the Aboriginal people of that country.
- (4) Ensuring that Aboriginal stories, information, cultural knowledge and cultural narratives are treated with the greatest respect and honour.
- (5) Abiding by the confidentiality to be accorded to all materials given to the Commission in confidence.
- (6) The Commission will treat cultural materials given to it, including stories, information, cultural knowledge and cultural narratives as the property of relevant Aboriginal people, subject to the laws of the state and the Commonwealth.
- (7) The Commission does not wish to own, nor claim to own, the stories and information given by Aboriginal people, subject to the laws of the state and the Commonwealth.
- (8) Ensuring that the principles contained in this Memorandum of Commitment continue past the life of the reference on Aboriginal customary laws.
- (9) Ensuring at all times that the aspirations and views of Aboriginal people are respected and acknowledged.³



2. The membership of the ARRC may be found at Appendix C to this Discussion Paper.

3. A signed facsimile of the Memorandum of Commitment may be found at Appendix B to this Discussion Paper.

Confidentiality of Cultural Information

As well as wishing to conduct its inquiry with integrity and respect for cultural protocols and practice, the Commission was especially concerned to ensure that Aboriginal people retained ownership (or custodianship) of the cultural information exchanged and gathered for the reference. As a government agency, the Commission is obliged to retain records and documents for certain required periods under the *State Records Act 2000* (WA); these documents and records could then be subject to an application for release or review under the *Freedom of Information Act 1992* (WA). The Commission was concerned that these statutes might enable culturally restricted information (that is, stories or information traditionally restricted under an Aboriginal community's traditional laws and customs to a particular gender or a particular class of persons) to become available to persons that might not otherwise be permitted by the cultural owners to have access to it. The Commission was also aware that information of a very personal nature may be shared with it during the course of the reference and wanted to ensure the confidentiality of any such information.

After consultation with the ARRC and the Project Team it was decided that, in the interests of protecting as far as possible any significant cultural information of Aboriginal people, the Commission would ensure that:

- information on the ownership, access and treatment of information would be communicated by the Commission to Aboriginal communities at the pre-consultation phase as well as during the formal introduction to consultation meetings;
- only the formal introduction stage of consultation meetings would be video-recorded by the Commission and that only hand-written notes in summary form would be made of the ensuing proceedings;
- the names of individuals sharing information would not be recorded by the Commission; and
- in instances of particularly sensitive information, the Commission would only record the *essence* of the information in order to respect the cultural significance or personal nature of the information, as well as its source.



The Commission abided by these principles throughout the research-gathering phase of the reference and ensured that all researchers and facilitators involved in the reference understood the limits placed upon the recording of information. In this way a practicable balance was struck between the need for records to be made of information pertinent to the proper execution of the reference and the need to protect certain information from unintended disclosure.

Research Method

In consultation with the ARRC and the Commission, the Project Team designed the process for data collection for the reference. The process included focus group meetings with key stakeholders, community consultations in all regions of the state and the publication of background papers to provide a dedicated research base for certain areas covered by the reference.

Focus Group Meetings

During the early stages of research-gathering for the reference, the Commission carried out a number of focus group meetings with key stakeholders including the Aboriginal and Torres Strait Islander Commission (ATSIC), the Aboriginal Legal Service (ALS), the Department of Indigenous Affairs WA (DIA), the Department of Justice (WA) Community Corrections Unit; and the Parole Board of Western Australia. The Commission also held meetings with local Elders and with representatives of a number of Aboriginal community-based organisations around the state including Clontarf Aboriginal College; Bundiyarrah Centre; Wongatha Wonganarra Community Centre; Wangka Maya Language Centre, Wirraka Aboriginal Health Centre; Bloodwood Tree Association; Kimberley

Aboriginal Law and Culture Centre; and several local Aboriginal corporations and land councils. These meetings provided the Commission with important information to assist the consultation process.

Community Consultations

Like the ALRC, the Commission determined that the best way to research the potential for recognition of Aboriginal customary laws was to speak with the people directly concerned. The Commission therefore organised a series of consultative visits to Aboriginal communities in the Perth metropolitan area, as well as in the regional and remote areas of Western Australia.

Pre-consultation meetings

The main consultations were preceded by a number of pre-consultation meetings undertaken by the Project Team and members of the Commission in all areas visited. These meetings gave the Commission the opportunity to introduce the project to Indigenous communities, community leaders and local Aboriginal organisations. The Commission was also able to seek advice from these individuals and organisations about the conduct of consultation meetings in the area; the

preferred dates, locations and venues for meetings; the predicted attendance at meetings; the necessary arrangements to be made in respect of transport and culturally appropriate catering; and the best way to reach people to ensure that they were made aware of the location, dates and times for consultation meetings. Advice was also sought about the particular issues concerning Aboriginal people and communities in each area to better prepare the Commission for its consultative visits.

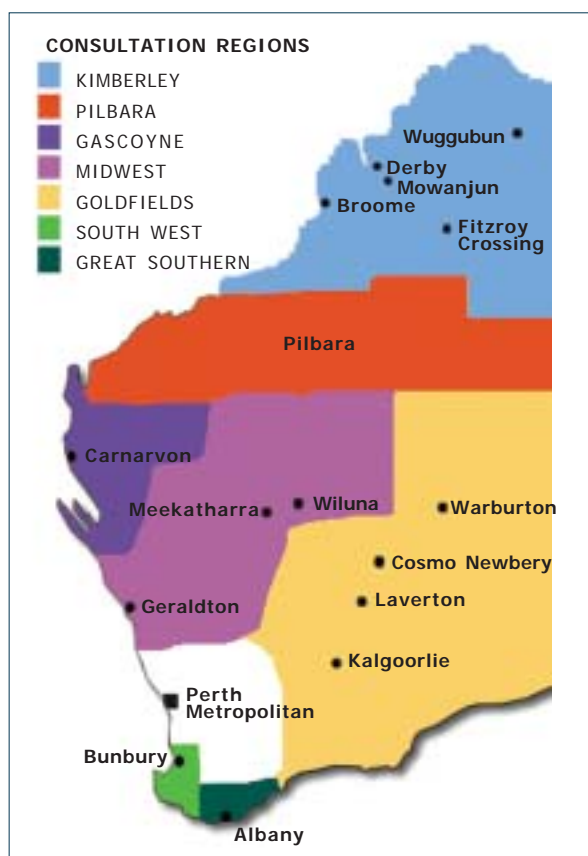
During the pre-consultation phase the Commission distributed relevant information about the reference, including copies of the Project Overview, the signed Memorandum of Commitment and a video produced by the Commission that explained the reference in easy-to-understand and culturally appropriate terms. The Commission also sought formal permission from Elders and appropriate community leaders to conduct consultations within their communities and upon Aboriginal land.

Metropolitan consultations

The Commission began its formal community consultations in November 2002 with meetings held in the Perth metropolitan area. Acting upon advice from the Project Team and the ARRC, the Commission decided to conduct five community consultations in the metropolitan area, covering the areas of primary Aboriginal residence in the capital.

Each of the consultations commenced with introductions by the Project Manager and Special Commissioner Beth Woods followed by a traditional welcome to country and a presentation about the project by then Chairman of the Commission, Professor Ralph Simmonds (now the Hon. Justice Simmonds of the Supreme Court of Western Australia). After the formal introductions and welcome, the consultations were opened up for contributions, comments and discussions by all who were present. These discussions sometimes occurred with the group as a whole and sometimes within smaller discussion groups to reflect more specific concerns.

During the metropolitan consultations notes were taken by the Project Team in accordance with the guidelines discussed above under the heading 'Confidentiality of Cultural Information'. These notes were then compiled by the Research Directors (in collaboration with other members of the Project Team) into thematic summaries. The thematic summaries of all consultations were made publicly available on the Commission's



website⁴ as they came to hand. The specific issues of concern to Aboriginal people, outlined in these thematic summaries, will be discussed in more detail in the following chapters.

Regional and remote consultations

During 2003, the Commission conducted consultative visits of the main regions of the state including the south west and Great Southern regions; the Goldfields and Western Desert regions; the Pilbara and Kimberley regions; and the Gascoyne and mid-west regions. In each of these regions a number of large public meetings were held. The Commission also met with representatives of local Aboriginal organisations and regional authorities (such as local shire councils, ATSIC, DIA, the Western Australian Police Service and local magistrates). Where possible, the Commission visited regional prisons to ensure that those in direct daily contact with the justice system were also given the opportunity to contribute.⁵

The format of the regional and remote consultations varied according to the requirements of the local communities and the advice obtained by the Commission in its pre-consultation meetings. In many cases consultations took place over a number of days and included large public meetings, gender-based discussion groups, theme-based discussion groups and one-on-one (or restricted group) confidential briefings. The consultations were guided by four key questions that together provided a focal point for the discussion of customary law issues:

- How is Aboriginal customary law still practised?
- In what ways is it practised?
- In what situations is it practised?
- What issues confront Aboriginal people when practising their law today?

While the Commission employed these questions as a general guide for discussion of law issues, the questions were not always in direct alignment with the issues confronting particular Aboriginal communities. A degree of flexibility in the consultation process was therefore required.



As with the metropolitan consultations, care was taken to ensure that information recorded by the Project Team was done so in compliance with the protocols established by the Commission in consultation with the ARRC.

Background Papers

In early 2003, the Commission advertised a call for papers on matters relating to the practise and recognition of Aboriginal customary law and its interaction with Australian laws, particularly the laws of Western Australia. A total of 15 background papers were commissioned from highly regarded authors with particular expertise in their relevant field. Published papers covered Aboriginal customary law as it relates to family law; the criminal justice system; provision of interpreting services; international law; Indigenous cultural and intellectual property; women's interests; and other general topics. A detailed case-study of a north-west community was also commissioned.

Details of the background papers published by the Commission for the purposes of this reference are listed below. Opinions expressed in the background papers are those of their individual authors. Whilst the Commission does not necessarily endorse the authors' opinions it has taken the information contained in the background papers into account in producing the proposals advanced in this Discussion Paper.

4. See <<http://www.lrc.justice.wa.gov.au>>.

5. The Commission visited regional prisons at Roebourne, Greenough and Albany, as well as Bandyup Women's Prison and Casuarina Prison in the Perth metropolitan area.

List of Background Papers published

1. Victoria Williams, 'The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law' (December 2003).
2. Michael Cooke, 'Caught in the Middle: Indigenous Interpreters and Customary Law' (March 2004).
3. Greg Marks, 'The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area' (June 2004).
4. Tony Buti and Lisa Young, 'Family Law and Customary Law' (August 2004).
5. John Toohey AC QC, 'Aboriginal Customary Laws Reference – An Overview' (September 2004).
6. Kathryn Trees, 'Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study' (November 2004).
7. Neil Morgan and Joanne Motteram, 'Aboriginal People and Justice Services: Plans, programs and delivery' (December 2004).
8. Harry Blagg, 'A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia' (January 2005).
9. Greg McIntyre SC, 'Aboriginal Customary Law: Can It Be Recognised?' (February 2005).
10. Megan Davis and Hannah McGlade, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' (March 2005).
11. Chris Cunneen and Melanie Schwartz, 'Customary Law, Human Rights and International Law: Some conceptual issues' (March 2005).
12. Terri Janke and Robynne Quiggin, 'Indigenous Intellectual Property and Customary Law' (March 2005).
13. Catherine Wohlan, 'Aboriginal Women's Interests in Customary Law Recognition' (April 2005).
14. Steven Churches, 'Aboriginal Customary Law in the Context of Western Australian Constitutional Law' (April 2005).
15. Phillip Vincent, 'Aboriginal People, Criminal Law and Sentencing' (June 2005).

PART II

Aboriginal Peoples in Western Australia

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Aboriginal Peoples in Western Australia

A Brief History

The Impact of Colonisation

Western Australia was founded as a British colony in 1829, some 40 years after the east coast of Australia was first colonised. Despite evidence that the colonial governing authority was instructed by the British monarch only to 'grant unoccupied lands',¹ the Aboriginal people of Western Australia were gradually dispossessed of their traditional tribal lands as more and more land was granted to pastoralists and graziers. These dispossessed peoples were sometimes taken into service (often unpaid) by European 'settlers'; many others, forced to kill cattle for survival, were taken into custody by police and removed to the nearest major settlement for trial.² Various legislative and administrative measures for the protection of Aboriginal people,³ the segregation of Aboriginal people into missions away from town sites,⁴ and the removal of 'half-caste' children,⁵ were in place from the early days of colonisation.

In 1904 a Royal Commission was called to inquire into the 'condition of the natives' in Western Australia.⁶ The Commissioner found that most Aboriginals lived in poor conditions, that Aboriginal prisoners were ill-treated⁷ and that there were 'grave irregularities in the distribution of [government] rations'⁸ to Aboriginal people. The Commissioner's primary recommendation was for the establishment of large hunting reserves 'for the exclusive use of the natives'.⁹ He warned that

dire consequences would follow if the existing system of 'land-grabbing' were to remain.

If the natives continue to be dispossessed of the country upon which they are dependant for their food and water supplies, by their lands being rented for grazing rights at a nominal figure—lands from which the lessees naturally desire to drive them—bloodshed and retribution will be certain to ensue, and the Executive, in its efforts to restore law and order, and in the cost of rations to make up deficiencies in the natural food supplies, will be ultimately put to an expenditure considerably in excess of the total rents received. Carrying the present practice of Might against Right to a logical conclusion, it would simply mean that, were all the land in the northern areas of this State to be thus leased, all the blacks would be hunted into the sea. The poor wretches must be allowed the wherewithal to live – their main hunting grounds and water supplies. They dare not voluntarily migrate elsewhere, as such action, according to tribal law, would constitute a trespass, punishable by death.¹⁰

Protection and Assimilation

The 1904 Royal Commission resulted in the enactment of the *Aborigines Protection Act 1905* (colloquially referred to as 'the 1905 Act'). This Act prohibited Aboriginal people who were not in lawful employment from entering town sites; provided for the establishment of new reserves and missions; allowed the Minister of Aboriginal Affairs to 'remove' Aboriginals from one reserve or district to another; and required the permission of the Chief Protector of Aborigines for a

1. Australians for Reconciliation (WA), *Western Australia's Other History: A short guide* (undated).

2. Royal Commission on the Condition of the Natives (Western Australia), Report (1905) 13–17.

3. 'Protectors' were appointed by executive order in Western Australia from the early days of settlement to protect Aboriginals against abuse; however, protectors were often powerless or without legal status. At various times during the state's history, the idea of Aboriginal protectors was abandoned or otherwise the office was vested ex officio in regional police constables (whose position as officers of the law often contradicted their responsibilities of protection when dealing with Aboriginal suspects). See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [25]; Royal Commission on the Condition of the Natives, *ibid* 5.

4. According to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), certain government directives dating from the 1840s forbade any Aboriginal to reside near town sites. By the 1920s it is reported that Aboriginals were forbidden to enter towns. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) Ch 2.

5. *Ibid*. During the early to mid-1800s few European women resided in the Swan River colony and miscegenetic progeny were often the result of the sexual exploitation of Aboriginal women by European men.

6. The Royal Commission was headed by Dr WE Roth, an ethnographer and Chief Protector of Aboriginals in Queensland.

7. Royal Commission on the Condition of the Natives (Western Australia), Report (1905) 15–17.

8. *Ibid* 23.

9. *Ibid* 28.

10. *Ibid*.

marriage between an Aboriginal woman and a non-Aboriginal man.¹¹ Section 8 of the 1905 Act gave the Chief Protector of Aborigines legal guardianship of all Aboriginal and 'half-caste' children under 16 years of age and the authority to remove them from their natural parents.

In 1937, the Western Australian Chief Protector of Aborigines, AO Neville made a speech to the Conference of Commonwealth and State Protectors of Aborigines in Perth explaining the rationale behind the practice of removing Aboriginal children from their families to be brought up in state institutions in non-Aboriginal communities. He believed that full-blooded Aboriginals would soon be extinct and that 'half-caste' children could usefully be employed in domestic service and thereby 'absorbed into the general community'.¹² This policy of assimilation was formalised and practised in Western Australia and other states over the following three decades; the children taken from their parents pursuant to the policy ultimately became known as the 'stolen generation'. A 1995 national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families (the 'Bringing Them Home Inquiry') concluded that 'the forcible removal of Indigenous children was an act of genocide contrary to the Convention on Genocide, ratified by Australia in 1949'.¹³

The Impact of Past State Government Policy

The impact of the official integration and protection policies followed in Western Australia since colonisation has been profound. The unsanitary and cramped living conditions on Aboriginal reserves have had an ongoing negative effect on the health of Western Australia's Indigenous population.¹⁴ Today, Aboriginal people have a life expectancy that is 15–20 years less than non-Aboriginal Australians and the mortality rate of Aboriginal

infants in Western Australia is more than 2.5 times higher than that of non-Aboriginal infants.¹⁵ The effects of removal on the social and emotional wellbeing of members of the stolen generation and their families are still being revealed today. In his *Regional Report of Inquiry into Underlying Issues in Western Australia*, undertaken for the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), Commissioner Patrick Dodson remarked:

[The 1905 Act], and the particularly oppressive measures it invoked, caused profound anguish, and the policies it introduced are still remembered with bitterness and repugnance by many Aboriginal people today.¹⁶

In its 1986 report on *The Recognition of Aboriginal Customary Laws* the ALRC also noted the continuing impact of historical government policy:

Changes in policy, even when addressed to problems created by the past, do not erase the past. The history of forced resettlement on reserves, the placing of many thousands of children in institutions, and the loss of land and culture are evident in the disadvantages still experienced by many Aboriginal people today.¹⁷

The challenge of overcoming the legacies of Australia's past treatment of its Indigenous population is substantial. It is hoped that the present inquiry will assist future governments to significantly reduce Aboriginal disadvantage in this state and assist Indigenous Western Australians to reclaim some of the culture and identity they have lost.

Demographic Profile

Today, Western Australia has the third largest Indigenous population in Australia.¹⁸ Of the estimated 1.9 million people resident in Western Australia, almost 66,000 are Indigenous.¹⁹ The highest number of

11. Human Rights and Equal Opportunity Commission (HREOC), *Bringing Them Home*, Report (1997) Appendix 5 'Western Australia'.

12. Neville AO, as cited in McRae H, Nettheim G & Beacroft L, *Indigenous Legal Issues* (LBC Information Services: Sydney, 2nd ed., 1997) 412.

13. Gardiner-Garden J, 'From Dispossession to Reconciliation', Parliament of Australia Research Paper No 27 (1999) 16, referencing HREOC's *Bringing Them Home* report.

14. Australians for Reconciliation (WA), *Western Australia's Other History: A short guide* (undated) 50–51.

15. Thomson N & Briscoe N, *Overview of Aboriginal Health Status in Western Australia* (Canberra: Australian Institute of Health, 1991) [5].

16. Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) Ch 2. Commissioner Dodson's concluding observation in this extract was echoed by participants in the Commission's community consultations.

17. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [29].

18. Following the Northern Territory with 28.8 per cent of total population and Tasmania with 3.7 per cent of total population. Queensland has the same percentage of Indigenous residents as Western Australia at 3.5 per cent. See 'Geographic distribution of Indigenous Australians' in Australian Bureau of Statistics (ABS), *2004 Year Book Australia*, No 86 (2004) 89.

19. Ibid. It is interesting to note that the number of Indigenous people in Western Australia almost doubled in the 15 years between 1986 and 2001. The increase cannot be accounted for by birth rate alone. According to HREOC, the ABS attributes the increase to the growing willingness of people to identify themselves as Aboriginal or Torres Strait Islander. See HREOC, 'A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia' <http://www.hreoc.gov.au/social_justice/statistics/>.

The challenge of overcoming the legacies of Australia's past treatment of its Indigenous population is substantial.

Aboriginal people in the state resides in the Perth metropolitan area.²⁰ In respect of the state's regions, the DIA has noted that:

The Kimberley has the highest proportion of Aboriginal people of any of the state's regions, making up one-third of the total regional population. Outside the major towns, Broome, Kununurra and Derby, Aboriginal people in the Kimberley make up the overwhelming majority of the population. There is a similar picture in the Pilbara, where 5,736 Aboriginal people were counted [in the 2001 Census] out of a total population of 42,411, a proportion of 13.5 per cent. Outside the Pilbara towns of Port and South Hedland, Karratha, Newman and Tom Price, the majority of the population is Aboriginal.

Significant populations of Aboriginal people live in all other regions of Western Australia, in particular Central (9.2%), South Eastern (9.2%), Upper Great Southern (4.8%), and Midlands (4%). It is significant that while Aboriginal people throughout the state have moved increasingly to the major population centres, they continue to make up high proportions of the populations of rural and regional areas.²¹

As these statistics suggest, there are a significant number of Aboriginal communities in Western Australia with a high concentration of communities in the north of the state in the Kimberley and Pilbara regions.²² A large number of traditional Aboriginal people—for whom Aboriginal customary law is a daily reality—reside in the East and West Kimberley, East Pilbara, and Western Desert regions. It has been noted elsewhere that some language groups in those regions only experienced their first substantial contact with non-Aboriginals in the mid-twentieth century.²³ Even after contact, some groups of Aboriginal people in Western Australia continued their

nomadic lifestyles for a significant period of time, remaining 'outside the orbit of European influence'.²⁴

Appreciating Diversity

It is important to note from the outset that, like the general Western Australian population, the Aboriginal population of the state is diverse in its makeup, culture, customs and beliefs. Norman Tindale's anthropological studies during the 1950s and 1960s indicate that over 120 language groups or tribes existed in Western Australia at that time.²⁵ Each of these tribes had their own languages, culture and customs. Due to the fact of colonisation, as well as past government practices of assimilation, removal of Aboriginal children from their families and segregation of Aboriginal people on designated reserves, some of these tribes have died out or their lands, languages and cultural practices have been lost. In addition, new communities of Aboriginal people have been established in and around former mission centres and reserves. These communities (often made up of Aboriginal people forcibly removed from other areas) contain individuals who descend from different language groups²⁶ and who may have integrated their traditional cultural practices over a period of many years.

Because of these facts, the DIA warns against the use of singular expressions such as 'the Aboriginal community' to describe the general Aboriginal population of Western Australia.²⁷ The Aboriginal population of Western Australia is made up of many different communities, indeed many different individuals, the diversity of which is apparent in many ways: geographic, demographic, cultural, linguistic, political and economic.²⁸

20. According to the 2001 Census, just over 20,000 Aboriginal people were recorded as residing in Perth. This figure represents 1.5 per cent of the total metropolitan population of 1,325,392. See ABS, *2001 Census of Population and Housing* (2002).

21. Department of Indigenous Affairs (DIA), *Consulting Citizens: Engaging with Aboriginal Western Australians* (April 2004) 9.

22. A series of maps showing the distribution and location of Aboriginal communities across the state may be found in Appendix D to this Discussion Paper.

23. Such as the Northern Ngatjatjarra, Mangala, Mantjiltjarra and Walmatjarri peoples: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [34].

24. For example, the ALRC has noted that '[a] group of nine members of the Pintubi language group, remade contact with their relations at an outstation in Western Australia in October 1984 after living for more than twenty years in complete isolation near Lake Mackay': ALRC, *ibid* 27–28.

25. See the map 'Tindale Tribal Boundaries – Western Australia' at Appendix E to this Discussion Paper. It should be noted that the tribal boundaries of a number of language groups cross the arbitrarily drawn boundaries that designate the different states and territories of Australia.

26. DIA, *Consulting Citizens: Engaging with Aboriginal Western Australians* (April 2004) 8.

27. *Ibid*. Whilst the Commission has done its best to observe this standard in its Discussion Paper there are some instances of quotes cited from other sources which refer to 'the Aboriginal community' in general terms. There are also instances where generic reference to 'Aboriginal people' is considered necessary to meaningfully furthering the discussion and cause of recognition of Aboriginal customary laws. Nonetheless, particular attention has been paid throughout this paper to the divergence of laws and customs as well as the differences in experiences, opinions and ideas of Aboriginal peoples and Aboriginal communities across the state.

28. *Ibid*.

Consultation Findings

As described in Part I, the Commission conducted public consultations with Aboriginal communities across the state. These consultations took a variety of forms from large public hearings to small group discussions and meetings with individuals and community representatives. General discussion yielded a bounty of information relating to the existence and practise of customary laws by Aboriginal people in Western Australia; however, the consultations also revealed a great number of issues generally affecting Aboriginal communities. While these issues may have obvious links to the *customs* of Aboriginal communities, they sometimes have far less clear connections with Aboriginal *law*. Nonetheless, the Commission accepts that these issues do fall within its mandate as matters relevant to 'the views, aspirations and welfare of Aboriginal persons in Western Australia'¹ and are otherwise crucial to the proper execution of the reference. These issues were very real factors in the lives of those people that the Commission consulted for this reference and merit discussion in the context of this paper.

Issues Affecting Aboriginal Communities in Western Australia

Issues of particular concern to Aboriginal communities consulted for this reference included children and youth; health and wellbeing; aboriginality and identity; racism and reconciliation; education, training and employment; housing and living conditions; and substance abuse. These will be discussed under separate headings below. Other significant issues of concern to Aboriginal communities included Elders and cultural authority (discussed in Part X 'Aboriginal Community Governance in Western Australia' and Part V 'Aboriginal Customary Law and the Criminal Justice System'); family violence

and the welfare of children (discussed in Part VII 'Aboriginal Customary Law and the Family'); and the release of Aboriginal prisoners for attendance at funerals and the over-representation of Indigenous people in Western Australia's prison population (discussed in Part V 'Aboriginal Customary Law and the Criminal Justice System').

Unless otherwise noted, the information discussed below is taken directly from the thematic summaries of consultations which record the opinions and concerns of Aboriginal communities consulted for the Aboriginal customary law reference. The thematic summaries are publicly available on the Commission's website.²

Children and Youth

A principal concern raised by Aboriginal communities consulted across the state was the lack of respect shown for adults (particularly Elders) by Aboriginal youth.³ Many communities saw this as a direct consequence of the decline of traditional law; others saw it as a consequence of the lack of suitable role models or mentors. The consensus in Aboriginal communities across Western Australia was that their young people need more discipline. However, it was noted that it was becoming increasingly difficult for Aboriginal families to administer traditional discipline because of the tendency of children to threaten families with 'white man's law'.⁴ It was said that the white man's law thereby undermined traditional Aboriginal family structures.

Metropolitan communities stressed the need for parenting skills programs to assist parents to deal with their children. It was noted that the stolen generation had significant repercussions in this regard – that parents had not been taught Aboriginal law and

1. As expressed in the final bullet point of the Commission's Terms of Reference: see above p v.
2. See <<http://www.lrc.justice.wa.gov.au>>. The thematic summaries are also published separately on a CD-ROM, available from the Commission.
3. See generally the Commission's Thematic Summaries of Consultations. See also the comments of community members in Roebourne recorded in Kathy Trees' case study: Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 6 (November 2003).
4. Aboriginal concerns about discipline of children and the constraints of Australian law in this regard are discussed further in Part V 'Aboriginal Customary Law and the Criminal Justice System', below pp 187–88.

In Carnarvon [it was said that] there had been youth 'suicide epidemics' in town, that prison had become a 'rite of passage' for boys and that pregnancy had become a 'rite of passage' for girls.

Aboriginal ways and didn't learn how to be good parents.⁵ This view was shared by many of the experts consulted for the *Bringing Them Home Inquiry* who noted that members of the stolen generation often had no history of nurturing or socialisation and had 'difficulty in sustaining and developing good constructive family relationships with their own children'.⁶ It has also been suggested that the abuse and neglect experienced by some of the stolen generation whilst in care, accompanied by alienation from family and resulting confusion about cultural identity has contributed to problems of child abuse in contemporary Indigenous communities.⁷

Members of Aboriginal communities in the Kimberley, Pilbara, Gascoyne and metropolitan areas noted that their youth have low self-esteem, leading to problems of confused cultural identity, substance abuse and delinquency. It was argued that there was a need for specialised programs and activities to 'keep kids off the streets', build their confidence and assist them to acquire job-related skills such as improved communication skills. Communities in the mid-west suggested that many children have too much confidence: they think they are in control and have no respect for the white legal system.

Some disturbing issues were raised by communities in Carnarvon. It was said that there had been youth 'suicide epidemics' in town,⁸ that prison had become a 'rite of passage' for boys⁹ and that pregnancy had become a 'rite of passage' for girls. Alarming, the opinion was expressed that, because of alcoholism and



violence, many young people would be safer on the street or in an institution than they are at home.¹⁰

Overwhelmingly, Aboriginal communities in Western Australia expressed regret at the loss of traditional Aboriginal ways in respect of their dealings with children and youth.¹¹ It was understood that Aboriginal children were very much caught between two cultures, two

5. A participant at the Armadale consultation said: 'Responsibility is throughout families, not just parents but grandparents, aunties, uncles – all can discipline now. [Because of the stolen generation] no-one knows the correct way to parent ... because we don't live in the way that traditional people live ... we must find new ways ... if you are not a responsible parent you can't blame society for what your kids are doing'. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 18.
6. HREOC, *Bringing Them Home*, Report (1997) 222.
7. Westerman T & Hillman S, *Caring Well – Protecting Well: Strategies to prevent child abuse in Indigenous communities* (Perth: Indigenous Psychological Services, 2003) 2. The subject of child abuse is addressed in more detail below in Part VII.
8. The WA Youth Suicide Advisory Committee has reported that the 'rate of suicide among Aboriginal youth is double that of their non-Aboriginal counterparts': Youth Suicide Advisory Committee, *Report to the Minister for Health on Recommended Policy and Programs for Preventing Suicide and Suicidal Behaviour Among Aboriginal Youth in Western Australia* (August 1998) 4. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 2 & 6.
9. The view that crime is a 'rite of passage' for youth was also expressed in Geraldton. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 12.
10. Mention was also made of some young girls being prostituted by parents or guardians for financial gain – apparently to maintain drug or alcohol habits. Similar exploitation of young girls (by older men, not necessarily related) was reported in the Perth metropolitan area.
11. They also expressed sadness at their children's loss of culture and spirituality.

laws. Many participants believed that a return to traditional cultural practices would solve the problems perceived in Aboriginal youth. Others felt that things could be done within the current system to assist families and children to overcome these problems, including the establishment of parenting programs; early intervention strategies to deal with youth offending; improved after-school and weekend activity programs; drop-in centres or 'safe places' for Aboriginal children; cultural awareness programs and training in traditional ways (including Indigenous languages) for Aboriginal children; and programs to build self-esteem and equip youth with the skills and knowledge necessary for successful navigation through life.

Overall there was a consensus that it was necessary to develop Aboriginal-owned family healing programs and initiatives, designed to give Aboriginal people responsibility and authority to work on these issues with a long-term perspective. The importance of mediation and conferencing was stressed, as well as the need to incorporate a stronger community and cultural dimension in programs to ensure success.

Health and Wellbeing

On average Aboriginal people in Australia can expect to live up to 20 years less than their non-Aboriginal neighbours. Comparisons of life expectancy for Indigenous peoples in Australia, Canada, New Zealand and the United States suggest that Australia has the worst record in improving the life expectancy of its Aboriginal peoples.¹² Infant mortality rates for Indigenous peoples in each of these countries were similarly high 30 years ago, but now Indigenous Australians have the highest rate of infant mortality – a rate that is 2.5 times higher than that of non-



Indigenous Australians.¹³ Infant health is also a significant problem, with the rates of low birth-weight babies being worse in Indigenous Australia than in developing countries such as Ethiopia, Tanzania, Mexico and Indonesia.¹⁴

Studies undertaken by the Australian Bureau of Statistics show that the six main causes of death for Aboriginal people in the period 1999 to 2001 were: diseases of the circulatory system (including heart disease); external causes (including accidents, suicides, etc); neoplasms (including cancers); diseases of the respiratory system; endocrine, nutritional and metabolic diseases (including diabetes); and diseases of the digestive system.¹⁵ Major health risk factors for Indigenous people are obesity (causing diabetes and heart problems), smoking (causing respiratory disease, coronary heart disease, stroke and cancers) and excess alcohol consumption.¹⁶

These studies are borne out by what the Commission observed during its consultations. Many communities reported problems with drug and alcohol-related illnesses, including mental illness and behavioural disorders. In Wiluna, obesity, diabetes and heart problems were said to be rife. In Meekatharra, Aboriginal people reported a high incidence of cancers. While in the Pilbara region concern was expressed about a significant increase in diabetes in the Indigenous

12. HREOC, 'A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia', <http://www.hreoc.gov.au/social_justice/statistics> 5. A related issue, expressed by communities in the south-west region, was the need for early availability of superannuation for Aboriginal people. It was argued that, because of lower life expectancy, Aboriginal people did not often reach the age of retirement and therefore did not have the benefit of access to their superannuation before death. After death, it became a problem for families who often did not know how to access the funds.

13. Ibid 8.

14. Ibid 7.

15. Ibid 9.

16. Ibid.

population. It is noted that, while some of the illnesses reported by Aboriginal communities may be related to what might be called 'lifestyle choices' (ie, drug and alcohol-related illnesses), many health problems flow from the poor availability of fresh food in remote areas, as well as poor infrastructure¹⁷ to allow for the healthy preparation of food. Studies have shown that many community stores eschew stocking perishable, fresh foods (such as fruits and vegetables) in favour of high profit 'convenience' foods that are typically high in fat and salt content and low in nutritional value.¹⁸ Consumers who base their diets on these foods (for reason of lack of choice, ease of preparation and storage or otherwise) place themselves at high risk of obesity, diabetes and heart disease.

Health services

Many of the regions reported poor or ill-adapted community health services.¹⁹ In some cases there was a lack of staff (or indeed any local health services) and in others there were cultural barriers to appropriate treatment. The Australian Institute of Health and Welfare (AIHW) has found that 'the willingness of Indigenous people to access health services may be affected by such factors as community control of the service, the gender of health service staff, and the degree of proficiency [of the client] in spoken and written English'.²⁰ Adding to these problems is the distance (particularly in remote areas) that people must travel to access health services.²¹ The lack of community transport to health facilities in the Pilbara emerged as a significant problem. It was also reported that the ambulance service had refused to travel to certain Pilbara communities, even in emergencies.

In the larger regional centres some concern was expressed about lack of cultural training of hospital staff and health authorities. For example, Indigenous people in Hedland and Geraldton complained that 'avoidance laws' (traditional laws that dictate interactions between

certain kin) were not understood and that this resulted in people sharing wards or rooms inappropriately. It was reported that, in one instance, this caused a man to forego treatment and ultimately perish to avoid being placed near his mother-in-law in hospital. The AIHW has stated that the availability of Indigenous staff is an important factor in whether or not Indigenous people are able to effectively access health services.²² It was suggested at one of the consultation meetings that the Health Department should employ an Indigenous person on its interview panel to ensure that the selection criteria adequately address relevant cultural awareness skills and training. It was said that this may also result in more Aboriginal people applying for positions in hospitals, particularly regional hospitals.²³

An emphasis on an outcome-based approach to cultural awareness training in the health sector (that is, an approach that assists health workers to not just recognise cultural difference but to translate such recognition into culturally appropriate action) is required to address the issues raised by Aboriginal people in the Commission's consultations. An example of an outcome-based approach in action was provided by Aboriginal communities in Geraldton who applauded the efforts of Geraldton Hospital, which had reportedly adapted a lounge to accommodate an entire Aboriginal family who were obliged to remain with their dying relative.

A recent background paper published by the Department of Health in Western Australia recognises that current cultural awareness programs do not adequately deliver real cultural respect outcomes for Aboriginal people. It recommends the adoption of a new approach – that of 'cultural security'.

Cultural Security is focused directly on practice, skills and behaviours. It is about efficacy ... doing not talking. It is about building the competence of practitioners and administrators to know, understand and incorporate Aboriginal cultural values in the design, delivery and evaluation of health services.²⁴

17. For example, gas, electricity, refrigeration and water supply.

18. See George KL, *Community Stores and the Promotion of Health: An assessment of community stores and their functions in the promotion of health in Aboriginal communities* (Perth: Department of Health, 1996); Stewart I, *Research into the Cost, Availability and Preferences for Fresh Food Compared with Convenience Items in Remote Area Aboriginal Communities* (Australian Medical Association and Pharmaceutical Manufacturers Association, 1997).

19. There are signs of imminent improvement of health care services for Aboriginal people in Western Australia. In April 2004 the Commonwealth and Western Australian governments signed a memorandum of understanding to work together to upgrade health facilities and programs for Western Australian Aboriginal communities. The Commonwealth government has committed significant funding to realise new health care initiatives in this state.

20. Australian Institute of Health and Welfare (AIHW): see <<http://www.aihw.gov.au/indigenous/health/access.html>>.

21. In some areas doctors can only reach remote communities on a monthly basis; sometimes less frequently in the rainy season. For diseases such as meningitis the delay in diagnosis and treatment can be fatal. The risk of community-wide epidemics of infectious diseases is also magnified.

22. AIHW, <<http://www.aihw.gov.au/indigenous/health/access.html>>.

23. The Commission notes that the Office of Aboriginal Health (WA) has instituted an Aboriginal health scholarship program to encourage the enrollment of Aboriginal people in health related courses. See <<http://www.aboriginal.health.wa.gov.au>>.

24. Department of Health (WA), *Aboriginal Cultural Security*, Background Paper (undated) 13.



In view of comments made to the Commission during its consultations, the success of such a program would appear to hinge upon its flexibility to allow programs to be appropriately adapted to take account of regional differences and concerns of local Aboriginal communities. This would require non-centralised delivery and the significant involvement of Aboriginal people in each health service's client base. The monitoring of service delivery and accountability, particularly in respect of protection of cultural information, will be crucial to meaningful change in this area.

Mental health

The 1989 National Aboriginal Health Strategy suggests that Aboriginal people perceive their health in terms of the emotional, social and cultural wellbeing of their communities as well as the physical health of individuals.²⁵ Although the issue of mental health was not specifically raised by the Commission in its consultations, communities in the Gascoyne, south-west and Kimberley regions identified problems with mental illness in their communities and a need for improved mental health services.

According to AIHW there are 'large discrepancies in the mental health and emotional wellbeing of Indigenous peoples compared with non-Indigenous people'.²⁶ Unfortunately data-collection in the Indigenous health area has been insufficient to provide adequate information about the incidence of mental disorder among Aboriginal people.²⁷ It is expected that

this position will be remedied by the forthcoming 2004–2005 Indigenous Health Survey.²⁸ It is also expected that mental health service delivery will be improved by the development and adoption of a national strategic framework for Aboriginal and Torres Strait Islander mental health and emotional wellbeing;²⁹ however, for present purposes it is instructive to note the concerns and comments of Aboriginal communities consulted for this reference.

Communities in the Kimberley region linked problems with Indigenous mental health to neglect of traditional ways. Suggestions were made that mental health problems (and resultant suicides or self-harming) increased where traditional punishment for wrongdoings was delayed or interfered with by the justice system. It was suggested that Aboriginal healers could be more involved with the treatment of Indigenous people with mental illness – this would assist mental health workers to understand the cultural aspects of Indigenous peoples' wellbeing. Mental health services in Broome were also criticised. It was said that communication with those in mental health facilities and their families was particularly difficult.

Communities in Carnarvon said that the need for mental health services in that area was unmet. In this region problems with mental illness were often linked to substance abuse. It was suggested that funding was needed to provide mental health counselling, particularly for adolescents. In view of the high rate of youth suicides reported in this area, the provision of culturally appropriate, community-based mental health counselling should be viewed as a priority.

Communities in Albany also pointed to a need for more culturally appropriate counselling services in that region. It was considered that the current practice of one-on-one counselling was not appropriate to Aboriginal people and that more focus should be given to family and group counselling.

The Commission accepts that there are many factors that affect the social and emotional wellbeing of Aboriginal people in Western Australia and which, in some cases, can contribute to the development of significant mental disorders. Such factors include inadequate housing and poor living conditions; alcohol

25. AIHW, <<http://www.aihw.gov.au/indigenous/health/access.html>>.

26. Ibid.

27. Ibid.

28. Ibid.

29. This framework was in the consultation phase at the time of writing.

Aboriginal people perceive their health in terms of the emotional, social and cultural wellbeing of their communities as well as the physical health of individuals.

and drug abuse; family violence and physical or sexual abuse; racism and lack of cultural identity; cultural issues such as payback;³⁰ and socio-economic disadvantage. The Commission therefore acknowledges that improvements to the delivery of mental health services (or the promotion of relevant programs) alone will not necessarily provide solutions to the problems outlined by Aboriginal communities in the consultations. Clearly a more holistic approach to the health care of Indigenous people is required.

The consultation draft of the *National Strategic Framework for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Wellbeing 2004–2009* suggests that strategic improvements in promotion of programs and service delivery in key portfolio areas across government (including housing, family and community services, education, income support, culture, as well as health) will have the potential to enhance social and emotional wellbeing, improve Indigenous mental health and assist in the prevention of youth suicide.³¹ The Commission supports this approach.

Substance Abuse

Substance abuse was reported to be a significant problem by most of the communities consulted for this reference. The majority of communities reported considerable difficulty in dealing with alcohol and inhalant abuse; these concerns are discussed in detail below. Amphetamines, marijuana and opiates were also among the substances reportedly abused.

Alcohol

Alcohol abuse (and its associated health and social consequences) has long been an issue for Australia's Indigenous population. This problem dates back to the introduction of alcohol by Australia's first European 'settlers'. Today, the proportion of Indigenous people in Australia consuming alcohol at the low-risk level is similar to that of non-Indigenous people.³² However, there is a slightly greater proportion of Indigenous people consuming alcohol at a high-risk (excessive or harmful) level compared with non-Indigenous people.³³ Disturbingly, approximately 70 per cent of Indigenous people aged 14 to 24 years who consume alcohol do so at a harmful level (that is, over six standard drinks). This figure drops to 67.1 per cent for Indigenous drinkers over the age of 25.³⁴ According to a recent government report, apart from serious harm to physical and mental health (including disability, depression, liver cirrhosis, cancers, pancreatitis, dependence syndrome and foetal-alcohol syndrome),

excessive alcohol consumption at the family and community levels contributes to interpersonal/domestic violence, financial problems, child abuse and neglect and family breakdown. It also contributes to acute hospitalisation from alcohol related injuries such as falls, traffic accidents, assaults, and suicides.³⁵

Alcohol-related crime is also an issue for Aboriginal communities; in particular, alcohol is a significant factor in Indigenous homicides.³⁶ For example, in 2001 just less than three-quarters of Indigenous homicides involved both the victim and the offender under the

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30. According to Tracey Westerman and Sharon Hillman, 'many mental health and well-being issues are directly related to cultural issues' such as payback for doing something wrong 'culturally'. They believe that this position reveals 'an obvious need for practitioners and services to be able to incorporate cultural factors into interventions'. Westerman T & Hillman S, *Caring Well – Protecting Well: Strategies to prevent child abuse in Indigenous communities* (Perth: Indigenous Psychological Services, 2003) 11–12.
 31. Social Health Reference Group, Commonwealth Department of Health and Aging, *Consultation Paper for the Development of a National Strategic Framework for Aboriginal and Torres Strait Islander Mental Health and Social and Emotional Wellbeing 2004–2009* (2003) 17–18.
 32. Steering Committee for the Review of Government Service Provision (SCRGSP), *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 8.3. These statistics are taken from the Australian Bureau of Statistics studies undertaken in 2001.
 33. Ibid. Indigenous people consuming alcohol at the high risk level were found to be more likely to be living in remote areas.
 34. Hennessy S & Williams P, 'Alcohol-Related Social Disorder and Indigenous Australians: Recent, past and future directions' in Williams P (ed.), *Alcohol, Young Persons and Violence* (Canberra: Australian Institute of Criminology, 2001) 149–50. The figures taken from this paper are from the 1994 National Drug Strategy Household Survey.
 35. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 8.2.
 36. Almost 30 per cent of Indigenous homicides involve alcohol compared to 10.5 per cent of non-Indigenous homicides. Ibid 8.8.

influence of alcohol at the time of the offence.³⁷ The Office of the Status of Women also reports that 70 to 90 per cent of domestic assaults in Indigenous communities are committed whilst under the influence of alcohol (and other drugs).³⁸

In Western Australia and elsewhere, a number of communities have sought to address these problems by the enactment of by-laws³⁹ prohibiting the sale and consumption of alcohol on community lands.⁴⁰ Such measures have been most successful in remote communities, such as Warburton, where access to alcohol outside the community is limited. Other 'dry' communities that are less remote (in that they have large towns in close proximity) report that they have been less successful in the prohibition of alcohol by enforcement of community by-laws.⁴¹

Inhalants

From the 1970s the incidence of inhalant use (or 'sniffing') among Indigenous people has increased. Sniffers tend to be aged in their teens; however, there are an alarming number of children (sometimes as young as eight years' old) consuming inhalant substances.⁴² Frequent abuse of inhalants can lead to permanent physical disability, brain damage or death.⁴³ Problems with inhalant use were consistently reported by Aboriginal communities across the state in both the metropolitan⁴⁴ and regional areas. In Kalgoorlie, it was reported that the problem of inhalant sniffing was endemic but that the causes were not being addressed. It was said that sniffing was a costless way of escaping poverty, abuse, hunger and family dysfunction.

The inhalation of legal volatile substances (such as petrol, paint, solvents and glue) is currently not a criminal offence. Many of the communities consulted for this reference stressed the need for power to deal with inhalant use, particularly in youth. It was said that sniffing should be prohibited and that police should have the power to take substances away from inhalant users.⁴⁵ The opinion was also expressed that if sniffing was recognised as a crime then users would get more support.

Recognising limitations on prohibiting the 'use' of legal everyday substances such as petrol⁴⁶ and glue, it is necessary to think more laterally about ways of assisting Aboriginal communities to overcome this problem. Given the key recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) regarding the need to divert Aboriginal people (particularly Aboriginal youth) away from the criminal justice system, the desirability of criminalising inhalant use must also be questioned.

One of the ways that Aboriginal communities can limit and control inhalant use is by the enactment of by-laws under the *Aboriginal Communities Act 1979* (WA); however, this avenue has not been widely used to date. Of the 25 Aboriginal corporations in Western Australia that have enacted community by-laws only 11 have enacted provisions prohibiting the possession, sale or supply of deleterious substances⁴⁷ for the purposes of inhalation.⁴⁸ The community at Cosmo Newbery has further enacted a provision authorising police officers to confiscate and dispose of any deleterious substance 'that he or she reasonably

37. Ibid. That is almost four times the rate for non-Indigenous homicides.

38. Ibid 8.11.

39. In Western Australia, these by-laws are enacted under the *Aboriginal Communities Act 1979* (WA).

40. See for instance, the *Wongatha Wonganarra Aboriginal Community By-laws 2003* (WA) s 11. Wongatha Wonganarra is an Aboriginal community in the Laverton (Goldfields) area.

41. Cosmo Newbery (a Goldfields Aboriginal community) reported that although their community has by-laws banning the consumption of alcohol, these have not been particularly effective because of the community's proximity to Laverton where alcohol is freely available.

42. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 8.11.

43. Ibid.

44. In particular in the Midland area where Indigenous respondents urged immediate action by government to this problem. The problem was also confirmed by the findings of the Gordon Inquiry and was the subject of recommendation 140 of that inquiry. See: Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002).

45. Police are empowered to seize intoxicants from children in public places under the *Protective Custody Act 2000* (WA). See below and Part V for further discussion.

46. In November 2004, petroleum manufacturer BP announced the release of 'Opal', a new unleaded fuel with reduced aromatics which considerably lessens its psychotropic effect on sniffers making it very difficult to achieve a 'high'. The federal government intends to subsidise the introduction of the new fuel for 14 remote Aboriginal communities in Western Australia. There have been criticisms of the limited application of the fuel-subsidy program and calls for it to be extended to regional centres to stop trafficking of petrol to affected communities. See 'New Petrol Provides No High for Sniffers', ABC Online, 10 November 2004: <<http://www.abc.net.au/central/news/200411/s1240473.htm>>; 'Abbott Rejects Calls for Wider Non-sniff Fuel Distribution', ABC News Online, 29 June 2005 <<http://www.abc.net.au/news/newsitems/200506/s1402755.htm>>.

47. Deleterious substances are generally defined as 'glue or any volatile liquid containing hydrocarbons and including marijuana, cocaine, speed, methylated spirits, crack, petrol and boot polish'.

48. These are the Cosmo Newbery Aboriginal Corporation, Jigalong Community Inc., Junjuwa Community Inc., Mugarinya Community Association Inc., Ngaanyatjarra Council (Aboriginal Corporation), Upurl-Urpurlila Ngurratja Inc., Yungngora Association Inc., Wongatha Wonganarra Aboriginal Community, and, most recently, Kundat Djaru Community, Irrungadji Community and Mowanjum Community.



imprisonment for three months or less, or both. Presently, the penalty for infringement of by-laws is the imposition of a fine not exceeding \$5,000.⁵² During the Commission's consultations, communities in Cosmo Newbery and Warburton reported that the control of alcohol and deleterious substances in their communities had been rendered less effective since the removal

of suspects is to be used or has been used for the purpose of inhalation and any container that contains or has contained such deleterious substance'.⁴⁹

A number of communities that have current and continuing problems with inhalant abuse have not enacted new by-laws or amended current by-laws to prohibit the possession and use of deleterious substances on community lands. These include the Balgo Hills Aboriginal community, where recent reports indicate that petrol sniffing may have been a contributing factor in three deaths over the past two years.⁵⁰ In 1982 when the Balgo Hills Aboriginal community enacted by-laws under the *Aboriginal Communities Act 1979* (WA) inhalant use was probably not prevalent. However, changed circumstances indicate the need for communities like Balgo to reassess the effectiveness of current by-laws and institute change where necessary.

In considering the effectiveness of offences under the *Aboriginal Communities Act* it should be noted that penalties for infringement of by-laws were significantly altered by the passage of the *Sentencing Act 1995* (WA) which removed the option to impose sentences of three months or less.⁵¹ Prior to the passage of this legislation infringement of community by-laws was generally met with a fine of \$100 or a term of

of the option of imprisonment.

In a 2002 submission to the Attorney-General the Ngaanyatjarra community at Warburton reported that '[s]ince 1995, a widely held community perception has developed that the justice system is not addressing public order and community safety offences adequately'.⁵³ It was argued that prior to 1995 the Ngaanyatjarra community had reported a marked reduction in the morbidity and mortality rates of volatile substance abusers subjected to short terms of imprisonment.⁵⁴ They requested that 'the full range of sentencing options be restored for offences under the *Aboriginal Communities Act 1979* (WA)' to aid in the effective deterrence of widespread substance abuse.⁵⁵ The Commission believes that, in view of the recommendations of the RCIADIC stressing the need to divert Aboriginal youth from the criminal justice system, the restoration of penalties such as imprisonment would be counterproductive. In particular, the application of serious criminal sanctions to inhalant abuse is unlikely to address the underlying social factors that cause Aboriginal youth to abuse solvents.⁵⁶ Part V 'Aboriginal Customary Law and the Criminal Justice System' of this Discussion Paper will investigate other options for responding to community safety and public order offences (including alcohol and substance abuse) in Aboriginal communities.⁵⁷

49. *Cosmo Newbery Aboriginal Corporation By-Laws 1993* (WA) s 13(2)(f).

50. 'Government Agencies Promise Schemes to Fight Petrol Sniffing', ABC Online, 30 September 2003: <http://www.abc.net.au/message/news/stories/ms_news_956496>.

51. *Sentencing Act 1995* (WA) s 86. In March 2004 sentences of six months' imprisonment or less were abolished under the *Sentencing Legislation Amendment Repeal Act 2003* (WA).

52. *Aboriginal Communities Act 1979* (WA) s 7(2)(d). Although communities have been slow to amend their by-laws to reflect this change.

53. Ngaanyatjarra Community, 'Law and Justice Submission to the Attorney-General of Western Australia' (April 2002) 7.

54. *Ibid.*

55. *Ibid.* 21.

56. Cleary S, 'Chroming: Child Protection before Law Enforcement' (2003) 39 *Indigenous Law Bulletin* 16.

57. See below pp 107–41.

Alcohol and other drug intervention projects

According to a 2000 survey undertaken by the Australian National Council on Drugs (ANCD), Western Australia has a total of 74 alcohol and other drug intervention projects which operate to specifically address the needs of Indigenous users.⁵⁸ Of these projects, 71 per cent are conducted by community-controlled Indigenous organisations.⁵⁹ Intervention projects in Western Australia include treatment programs (such as residential rehabilitation⁶⁰ and therapeutic counselling), acute intervention programs (such as night patrols and sobering-up facilities) and prevention programs (such as education and youth activities to provide alternatives to drug use).⁶¹

The ANCD 2000 survey indicated that the majority of the available intervention programs in Western Australia target alcohol abuse (the preponderance being acute intervention programs).⁶² Programs specifically targeting inhalant abuse were found in the Perth metropolitan area (2), the Western Desert region (1) and the east Kimberley (1); of these four programs only one was Indigenous-controlled and two had a focus on research rather than prevention. At the time of the 2000 survey, intervention programs with a multi-drug focus appear to have been concentrated in the Western Desert region and were overwhelmingly Indigenous-controlled.⁶³

The preference for Indigenous-controlled intervention programs was highlighted by many communities during the Commission's consultation process. In Carnarvon the strong desire for an Aboriginal-run sobering-up



shelter was expressed, although there is currently a non-Indigenous church-run facility operating in town. While non-Indigenous controlled facilities certainly have an important role to play, it is crucial that these initiatives work through cultural protocols and liaise with local Aboriginal-controlled programs (such as night patrols) and the local community.⁶⁴ The case of the Marrara Patrol (Fitzroy Crossing), discussed in Part V,⁶⁵ demonstrates the need for greater communication between service providers and for non-Indigenous organisations (including police) to receive regular local cultural awareness training to gain understanding of the limitations and obligations of Aboriginal-controlled services under Aboriginal customary law.⁶⁶

Generally the Commission found that the work of Indigenous night patrols throughout the state was applauded; however, some concern was expressed that where sobering-up shelters are unavailable the only place for night patrols to take their clients was to their homes. The high incidence of alcohol-related family violence in Indigenous communities highlights the need for suitable sobering-up facilities in affected areas. Many

58. Australian National Council on Drugs (ANCD), *Indigenous Drug and Alcohol Projects 1999–2000*, Research Paper No 4 (2002) 22.

59. *Ibid* 20.

60. An excellent example of an Indigenous-specific residential rehabilitation program is provided by Milliya Rumurra Alcohol and Drug Rehabilitation Centre in Broome. Established in 1978, at the behest of the local community, Milliya Rumurra takes a harm-minimisation (rather than complete abstinence) approach to alcohol abuse and seeks to strengthen social and family relationships by providing education and counselling and by accommodating the immediate family of clients. Whilst in the centre, clients have their health needs assessed and addressed and also voluntarily attend relevant programs run by other service providers, such as anger-management programs provided by the Department of Justice. Milliya Rumurra also runs a successful sobering-up shelter in the town centre which was established in 1999 in response to the recommendations of the RCIADIC. See ANCD, *Indigenous Drug and Alcohol Projects: Elements of best practice*, Research Paper No 8 (2003) 43–48.

61. A full list of Western Australian programs as at 2000 is appended to ANCD, *Indigenous Drug and Alcohol Projects 1999–2000*, Research Paper No 4 (2002) Appendix 2.

62. *Ibid* 41.

63. *Ibid* Appendix 2.

64. Harry Blagg and Giulietta Valuri have found that '[p]atrols operate best when they remain culturally embedded in Indigenous communities, respect local cultural protocols and operate from within Aboriginal terms of reference': Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15(3) *Current Issues in Criminal Justice* 2, 6.

65. See Part V 'Aboriginal Community Justice Mechanisms', below pp 107–41.

66. In particular the issue of avoidance relationships and the strict liability applicable to Indigenous workers for harm of a client while in their care at a shelter or other facility (particularly in a case where the person does not consent to being taken to the facility).

The preference for Indigenous-controlled [drug] intervention programs was highlighted by many communities during the Commission's consultation process.

communities also expressed the need for 'half-way houses' to assist those who have undergone rehabilitation for drug and alcohol addiction to successfully return to the community.⁶⁷ The Commission believes that for sobering-up facilities to avoid becoming 'revolving doors' to further alcohol or substance abuse, adequate pathways must be provided into relevant treatment programs. The Commission saw an excellent example in the South Hedland Ngooda-Gardy Patrol which provides a night patrol service, a sobering-up facility, and family violence intervention and itinerancy programs for Indigenous clients. The Yamatji Patrol in Geraldton has also expanded its services to include a family violence prevention unit which provides crisis prevention, counselling and advocacy services for victims of family violence. According to Harry Blagg, this type of 'value-adding' to embedded successful Indigenous-controlled initiatives (such as night patrols) is proving to be more successful than imposing new non-Indigenous controlled structures on communities.⁶⁸ Of course, these expanded initiatives will require supportive strategic partnerships with relevant government agencies and adequate government funding to guarantee the success of their operations.

Studies of government expenditure on intervention programs show that funding for programs in the southern and western regions of Western Australia is 'considerably below the national average'.⁶⁹ This prompted the ANCD to recommend investigation into whether these regions are adequately serviced.⁷⁰ The lack of services in some of these regions was drawn to the Commission's attention during its consultations, with Bunbury communities complaining of the lack of a sobering-up facility and drug and alcohol centre, and metropolitan communities pointing to the need for

suitable detoxification and rehabilitation programs in Perth.⁷¹

In August 2003 the Commonwealth's Ministerial Council on Drug Strategy released its *National Drug Strategy Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003–2006* (the Action Plan). The Action Plan was developed following extensive consultation with Indigenous communities and emphasises the need for realistic strategies to prevent and reduce Indigenous substance abuse. The Action Plan is structured around six key action areas: empowering Indigenous communities to address issues in the use of alcohol and other drugs in their communities; adopting a whole-of-government approach to collaborative service provision; improving access to health services; implementing a range of holistic approaches from prevention through to treatment and continuing care; instituting workforce initiatives to enhance the ability of community-controlled organisations to deliver quality services; and establishing sustainable partnerships among Indigenous communities, government and non-government agencies to develop and manage research, monitoring, evaluation and dissemination of information.⁷² Implementation of the Action Plan will be targeted over the next five years. Successful implementation will depend upon collaborative partnerships between the Commonwealth, state, territory and local governments and communities.

The Commission notes that the Department of Health (WA) has committed to the development of a state Aboriginal alcohol and drug strategy based on the Action Plan.⁷³ The Commission supports Health Department initiatives to address the problem of alcohol

67. Half-way houses were also suggested by a large number of communities and organisations consulted as a necessary measure for returning and recently paroled prisoners.

68. Blagg H, *A New Way of Doing Justice Business? Community Governance Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13–14.

69. ANCD, *Indigenous Drug and Alcohol Projects 1999–2000*, Research Paper No 4 (2002) 43.

70. Ibid.

71. A respondent at the Commission's consultations with Aboriginal women in Bandyup Prison (17 July 2003) said: 'The Ngoongar Alcohol and Substance Abuse Service needs to go out bush. It's no use where it is. It should go out and talk, take some kangaroo tails and go bush.'

72. Ministerial Council on Drug Strategy (Cth), *National Drug Strategy Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003–2006* (August 2003) 7.

73. Department of Health (WA), *Putting People First: Agency Drug and Alcohol Action Plan 2003–2005* (June 2003).

and drug abuse in Western Australian Indigenous communities, particularly the establishment of early intervention, prevention and diversion strategies. The Commission notes, however, that substance abuse is often a consequence of personal trauma, family violence or external factors such as poor living conditions, lack of meaningful activity or lack of opportunity. The Commission therefore endorses an integrated whole-of-government approach to dealing with Indigenous disadvantage and the underlying causes of substance abuse.

Aboriginality and Identity

The overwhelming desire to 'reclaim' Aboriginal cultural identity featured in many of the discussions that the Commission had with Aboriginal people and communities. The lack of pride in (and knowledge of) traditional Aboriginal culture and the confused cultural identity that inevitably results have already been mentioned as significant problems in Aboriginal youth, particularly in rural and remote areas. Issues surrounding cultural identity are also substantial for the increasing population of urban Aboriginals. Bronwyn Fredericks has written:

Aboriginal people have had to work hard to build and sustain positive Aboriginal identities due to the influence of the dominant culture on our lives ... The constant exchanges, interaction and dialogue with non-Indigenous urban society can present challenges to our identity. It can be a struggle to live life within the dominant culture, while at the same time trying to honour and protect our own heritage, institutions and worldview.⁷⁴

Fredericks also points out the difficulty of access to culture by many urban Aboriginal people. The geographical distance from country, language, law, and even from Elders, may reinforce a person's dislocation from Aboriginal culture and undermine his or her 'sense of Aboriginality'.⁷⁵ For many victims of the stolen generation, there is also the problem of establishing their genealogical identity as well as their cultural identity.

In addition to issues of cultural identity, Aboriginal people are required to prove their Aboriginality (or 'legal' identity) for the purposes of accessing government benefits and programs reserved for the exclusive benefit of Indigenous people. Proof of Aboriginality is also required for making claims to native title of land and for applications for protection of Indigenous cultural heritage.⁷⁶ However, as Loretta de Plevitz and Larry Croft write in their article *Aboriginality Under the Microscope*, there is no single legislative test defining Aboriginality for the purposes of access to these benefits; therefore, access is often dependent upon claimants satisfying certain criteria set down by the courts and government agencies.⁷⁷

The test has three elements, all of which must be proved by the person claiming to be Aboriginal: the person must identify as Aboriginal, the Aboriginal community must recognise the person as Aboriginal, and the person [must be] Aboriginal by way of descent.⁷⁸

The problem with this test according to de Plevitz and Croft is that, although the last element has been judicially interpreted to mean 'genealogical descent by quantum of Aboriginal genes', there is as yet no way of proving Aboriginality through genetic science.⁷⁹ The reason for this is that there is 'no such thing as a genetically differentiated "race", we are all one species'.⁸⁰ Moreover, the Aboriginal population of Australia is known to be significantly genetically diverse. The only thing that genetic science can reliably prove is relationship to a known person who also claims Aboriginality. This may prove difficult for those who have, as a result of past government policies, been removed from their Aboriginal families and have not yet been reconnected and for 'persons whose ancestral group has virtually been exterminated'.⁸¹

De Plevitz and Croft argue that the biological test of Aboriginality by proof of 'race' or descent should be abandoned and the question of Aboriginality should rest on cultural identification alone. This argument sits well with United Nations General Recommendations on

74. Fredericks B, 'Urban Identity' (2004) 12 *Eureka Street* 30, 30.

75. Ibid 31.

76. de Plevitz L & Croft L, 'Aboriginality Under the Microscope: The Biological Descent Test in Australian Law' (2003) 3(1) *Queensland University of Technology Law and Justice Journal* 1, 1.

77. Ibid.

78. Ibid. The threefold test is laid down by the High Court in *Commonwealth v Tasmania* (1983) 46 ALR 625, 817. The threefold definition was first proposed by the Department of Aboriginal Affairs, *Report on a Review of the Working Definition of Aboriginal and Torres Strait Islanders* (Canberra, 1981).

79. de Plevitz & Croft, ibid 2.

80. Ibid 13. See also Gardiner-Garden J, *Defining Aboriginality in Australia*, *Parliament of Australia*, Current Issues Brief No 10 (February 2003).

81. de Plevitz & Croft, ibid 17.

The Commission endorses an integrated whole-of-government approach to dealing with Indigenous disadvantage and the underlying causes of substance abuse.

the subject which state that membership of a particular racial or ethnic group should be 'based upon self-identification by the individual concerned if no justification exists to the contrary'.⁸² De Plevitz and Croft recognise the possibility of fraudulent claims to Aboriginality based on this means of identification but assert that the necessary 'recognition by an Aboriginal community will provide the requisite checks and balances'.⁸³

However, whilst the Commission accepts the arguments against biological identification, a test that demands only cultural identification may still allow the possibility of some Aboriginal claimants slipping through the net. The Commission heard of one case where the child of a parent who had left a community and no longer had ties to that community could not sufficiently prove Aboriginality on cultural criteria in order to claim education benefits. In addition, members of the stolen generation (an example given above by de Plevitz and Croft in their arguments against genetic testing for Aboriginality) may also suffer under a test consisting of purely cultural criteria; particularly where they or their descendants have been unable to reconnect with their Aboriginal families.

Although the Commission heard stories of incidents that go to the heart of this issue, the Commission has insufficient evidence of the extent to which proof of Aboriginal identity represents a problem for Indigenous people in accessing government programs and benefits in Western Australia. The Commission therefore invites submissions from interested parties on this matter. The issue of proof of Aboriginality for administrative purposes

dovetails with the Commission's consideration of the need for a standard definition of 'Aboriginal person' for legislative purposes (such as adoption, succession and customary harvesting rights) which is explored in Part III below.⁸⁴

Invitation to Submit 1

The Commission invites submissions on the problems faced by Aboriginal people in Western Australia in proving their Aboriginality, particularly for the purposes of accessing programs and benefits offered by Western Australian government agencies for the exclusive benefit of Aboriginal people.

Racism and Reconciliation

Racism

It's different for black and white [people]; how they are treated.⁸⁵

A disturbing trend in the Commission's consultations across the state was the complaints and examples of racism toward Aboriginal people.⁸⁶ Aboriginal communities, particularly those in large regional centres, reported entrenched racist attitudes, both in their everyday life and in dealing with government authorities.⁸⁷ Examples ranged from Aboriginal children being ejected from shopping centres for 'breach of dress code' whilst their similarly dressed white counterparts were permitted to remain, adults being refused entry to hotels and families being discriminated

82. Ibid 9. However, a significant incline in the rate of persons self-identifying as Indigenous has been noted in the last four Australian censuses (1986, 1991, 1996 and 2001). Gardiner-Garden observes that this rate far exceeds 'that expected from natural increase (indeed, over this period the fertility-rate of Indigenous women has actually been falling). These statistics have generated some debate'. See Gardiner-Garden J, *Defining Aboriginality in Australia*, Parliament of Australia, Current Issues Brief No 10 (February 2003) 8.

83. de Plevitz & Croft, *ibid*.

84. See 'Definitional Matters', below pp 47–52.

85. Participant at the Armadale consultation. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 20.

86. The Human Rights and Equal Opportunity Commission's (HREOC) 1991 National Inquiry into Racist Violence found that racism and racial violence against Aboriginal people in Australia was 'endemic'. For further discussion of this inquiry, see McGlade H, 'The International Prohibition of Racist Organisations: An Australian Perspective' (2000) 7(1) *E-Law: Murdoch University Electronic Journal of Law* 1.

87. In regard to institutional racism, see the discussion by Harry Blagg in his background paper to this reference: Blagg H, *A New Way of Doing Justice Business? Community Governance Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 5–6.

against in the rental housing market⁸⁸ to quite serious allegations of police failure to investigate Aboriginal deaths and strong community perceptions of police targeting Aboriginal people.

In Derby it was said that there was a discernible racist culture in the local police force. One respondent told a story of being at a meeting with a new police officer who had just arrived from Perth:

I look sort of white: when I told him I was Aboriginal he said, 'You must be one of the good ones then'. I thought about it and wondered, 'Is he being racist'? He just said it so matter of fact, like it was just okay to talk to me like that; he couldn't see anything wrong.⁸⁹

In Carnarvon there were reports of entrenched racism and name-calling:

There is still some entrenched racism. Resistance to establishing a sobering-up shelter is based on racism. The 'old guard' in town still call Aboriginal people 'natives', 'boongs' and 'niggers'. They can't come to terms with multi-culturalism, [they] think Aboriginal people are the 'criminals' and that the purpose of crime prevention is to have them arrested and moved out of town.⁹⁰

Locals in Carnarvon also suggested that racist attitudes and 'racist policing' have played a role in recent 'epidemics' of youth suicide in the area. In Geraldton Aboriginal people complained that because of their Aboriginality they were immediately 'judged as criminals'. In Albany there was a consensus that stereotypes of Aboriginal people impacted negatively across the whole Aboriginal community. Aboriginal respondents in Bunbury implored white people to ignore these negative stereotypes and 'respect the individual person'. The stereotyping of Aboriginal people and the lack of positive news stories about Aboriginal people were also raised by respondents to the Commission's consultations in Casuarina Prison:

Whites just see Aboriginals as 'niggers' in high speed chases, arrested by police and hand-cuffed.⁹¹

Reports of discrimination against Aboriginal people in Western Australia were not solely confined to government authorities and non-Indigenous businesses

but also extended to mainstream institutions. In Perth an Aboriginal business woman reported an account of what appears to be systemic racial discrimination by her local bank. She said:

When you go for a loan or something like that unless you've got ID—the ATSIC ID—they won't accept it. If they think that you are Aboriginal they will ask you if you have been to ATSIC, the first thing. I went to the bank to get a business loan – have been with them since I was like 15 and I had a number of accounts. And basically they asked me 'Have you been to ATSIC for the Aboriginal loan first?', and then I said 'No I don't want to do that'. Then they asked do I have an ATSIC ID and I said 'I am just like any other customer of your bank'.⁹²

Another Aboriginal woman reported an incident of mainstream health services segregating Aboriginal people:

You phone up about breast cancer and instead of giving you Cancer WA they will put you in touch with Aboriginal Health who don't specialise in that area. Over the years it has become entrenched that Aboriginal people go to the Aboriginal section or Aboriginal authority.⁹³

The Commission notes that it is unlawful under the *Equal Opportunity Act 1984* (WA) to discriminate in relation to the manner that goods and services are made available or in relation to the terms and conditions upon which those goods or services are provided. As will become clear below in the discussion on housing and living conditions, the Equal Opportunity Commission has found evidence of entrenched discrimination in relation to the provision of public housing to Indigenous peoples in Western Australia. The discussion also reveals that many Western Australian Aboriginal communities cannot rely on basic public infrastructure such as sewerage, waste disposal and clean water – services that many of us take for granted. Such significant divergence in service provision to different sectors of the community suggests that government must lead by example if the rhetoric of equality and non-discrimination is to be substantively embraced by the rest of society.

88. These examples may breach the provisions of the *Equal Opportunity Act 1984* (WA) which makes it unlawful to discriminate on the grounds of race in respect of the provision of services and facilities and employment.

89. LRCWA, Project No 94, *Thematic Summaries of Consultations – Derby*, 4 March 2003, 53.

90. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 6.

91. LRCWA, Project No 94, *Thematic Summaries of Consultations – Casuarina Prison*, 23 July 2003, 7.

92. LRCWA, Project No 94, anonymous submission.

93. LRCWA, Project No 94, anonymous submission.

“I look sort of white: when I told him I was Aboriginal he said, ‘You must be one of the good ones then’.”



Addressing racism in Western Australia

During the Commission's consultations, communities in the metropolitan area turned their minds to ways of combating racism against Aboriginal people in Western Australia. Suggestions included community education programs; development of media traineeships for Aboriginal people to heighten community exposure to Aboriginal culture and to offer role models for Aboriginal youth; government support for films depicting a diversity of Aboriginal people with positive messages;⁹⁴ cultural awareness training for all government employees including school staff and court staff, as well as training for lawyers, university staff and the media; and long-term strategies to encourage more Aboriginal people to enter Parliament.

In November 2001, the state government made a commitment to addressing issues of racism in the Western Australian public sector by establishing an Anti-

Racism Steering Committee and anti-racism strategy. The express purpose of the government's anti-racism strategy is:

To eliminate racism in all its forms by raising consciousness of issues relating to racism by first understanding racism in all its manifestations and then taking action to address the social and structural issues.⁹⁵

An important part of this anti-racism strategy is the implementation of a policy framework for substantive equality, directed by a dedicated Substantive Equality Unit of the Equal Opportunity Commission. This program recognises that there are substantive barriers to equal treatment by public sector agencies, in particular service providers, and to equal participation by all sectors of the community. Premier Geoff Gallop has commented:

Some of these barriers have been erected by systemic racism, a phenomenon that is more insidious than direct racial attacks because it is embedded in the processes, attitudes, policies and practices of institutions that have become routine operational practices but can unwittingly result in unequal outcomes for different people and groups. We should now make a concerted effort to ensure access to services to all Western Australians but also that the services being accessed do meet the needs of clients.⁹⁶

One way that the government intends to achieve its anti-racism agenda is by '[e]ncouraging and acknowledging positive initiatives in the elimination of racism and the promotion of harmonious relations in the community'.⁹⁷ In this regard, the Commission commends the suggestions made by Aboriginal communities, listed above.

Reconciliation

Reconciliation means different things to different people; however, the consensus of Aboriginal communities across Western Australia was that reconciliation was a crucial 'first step to healing' the

94. The Commission notes that Article 17 of the United Nations *Draft Declaration on the Rights of Indigenous Peoples* directs that 'states shall take effective measures to ensure that state-owned media duly reflect Indigenous cultural diversity'.

95. Public Sector Anti-Racism and Equality Program, *Draft Policy Framework for Substantive Equality* (August 2004) 4.

96. Equal Opportunity Commission, Substantive Equality Unit, *The Policy Framework for Substantive Equality* (undated) 3.

97. Ibid 4.

injustices of the past. For many, reconciliation meant more than simply saying 'sorry'; it required *recognition* of Aboriginal people as the original inhabitants of Australia and *respect* for Aboriginal culture, rights and laws. Most Aboriginal communities felt that such recognition and respect could only be achieved by constitutional change, a matter which will be discussed in Part III of this paper.

In regard to evidence of reconciliation in Western Australian communities, Kalgoorlie respondents indicated some local progress following a Reconciliation Forum organised by the City of Kalgoorlie-Boulder and visits to the region by former HREOC and Social Justice Commissioner Bill Jonas. It was said that mediators had been appointed to conduct consultation workshops with Indigenous and non-Indigenous community leaders with a view to developing an 'agreement for working together'. It was also reported that some former discriminatory policies of local businesses had been changed as a result of Kalgoorlie-Boulder's focus on local reconciliation. The establishment by the City of Kalgoorlie-Boulder Council of a Reconciliation Committee, which holds regular meetings and secures funding for the development of local initiatives such as the 'Living in Harmony Project' (which targets life skills and social needs of youth at risk in the Kalgoorlie-Boulder area) is to be applauded. In a not insignificant way, the example of Kalgoorlie-Boulder demonstrates the potential of local initiatives in achieving substantive reconciliation between Aboriginal and non-Aboriginal Western Australians.⁹⁸

The state government's *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians* demonstrates that there is the political will to work to achieve reconciliation in this state. The Statement of Commitment appears to offer the recognition and respect that Aboriginal people in

this state have expressed as crucial to the reconciliation process. But while there is some evidence of the government of Western Australia putting these principles into practice, the Statement of Commitment remains a document with questionable legal standing. Further, it does not bind or educate the people of Western Australia and it is at this grass-roots level that the reconciliatory efforts of government will ultimately be judged. Therefore, whilst the Commission enthusiastically supports active promotion of reconciliation at the state level (particularly on a more binding basis than the current Statement of Commitment),⁹⁹ it encourages the ongoing funding and development of local and regional initiatives to advance the cause of reconciliation in the general community and to address the root-causes of racism.¹⁰⁰

Education, Training & Employment

Education

Parents need to take responsibility and talk to teachers. It starts from the bottom – if we don't have a say in the schools then how are we going to have a say in Parliament?¹⁰¹

Amongst Aboriginal communities consulted for this reference there was universal concern about the education of youth and about education, training and employment opportunities available to Aboriginal people in Western Australia. The 2000 report of the national Taskforce on Indigenous Education found a vast educational inequality between Australia's Indigenous students and their non-Indigenous counterparts.¹⁰² Key areas of concern were access to education, literacy, numeracy, retention of students and attendance.

Many communities reported high rates of school absenteeism with Aboriginal youth. Aboriginal people suggested numerous causes for this including that many children were not interested in school or found it

98. Encouraged by the Kalgoorlie-Boulder example, the Commission contacted 141 of the state's 143 shire councils (the only councils not contacted were the Shire of Christmas Island and the Shire of Cocos (Keeling) Islands) to ascertain whether they had specific programs or initiatives in place for Indigenous reconciliation in their local areas. The Commission's enquiries indicated an overwhelming lack of council-run or council-funded reconciliation initiatives in areas that might reasonably profit from dedicated programs to address issues of racism and reconciliation. However the metropolitan councils of Fremantle, Cockburn, South Perth, Joondalup, Melville and Armadale appeared to be quite active with some councils funding a dedicated Aboriginal liaison officer position with responsibilities to furthering reconciliation at the local level. Some regional councils had reconciliation initiatives or 'statements of understanding or commitment' but few (apart from Albany) had the breadth of the Kalgoorlie-Boulder model. Some councils reported that they had once had reconciliation initiatives (including dedicated council committees) in place but that these had lost momentum and had consequently been abandoned. Others, such as Wiluna, reported that they had no need for reconciliation initiatives because they were predominantly Aboriginal towns.

99. See discussion of reconciliatory constitutional change in Part III below.

100. The Commission notes that the state government currently provides small grants of up to \$5,000 for local reconciliation projects under the 'Make Reconciliation Happen' scheme: see <<http://www.dia.wa.gov.au/DIA/Funding/Reconciliation/>>.

101. Participant at the Midland consultation: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 39.

102. See discussion of relevant outcomes of the *Report of the Ministerial Council for Education, Employment, Training and Youth Affairs' Taskforce on Indigenous Education* (March 2000) in Department of Education, Aboriginal Education Strategy, *Creating the Vision 2001–2004* (2002) 4. See <http://www.eddept.wa.edu.au/abled/Policies/Creatingthe_Vision.pdf>.

Aboriginal people felt that a greater focus on cultural learning would engage the children better, make them proud of their culture and heritage and help to keep them at school longer.

irrelevant; that Aboriginal children were laughed at or subjected to racist remarks and attitudes; and that Aboriginal students were marked absent when they were undertaking community-based cultural learning during law time.

It was the consensus in these communities (and this was the case right across the state) that schooling of Aboriginal children should include significant cultural learning as well as a standard western education. It was reported that although Indigenous studies was a compulsory component of the primary school level curriculum, it was too often neglected or not sufficiently adapted to local circumstances.¹⁰³ It was suggested that there was a need for community involvement in cultural learning, particularly the involvement of local Elders.¹⁰⁴ It was said that this would give cultural education local relevance and provide role models for Aboriginal children. It was also suggested that teachers should employ traditional educational strategies for cultural learning such as 'yarning' or storytelling; dance, art and music; and teaching certain subjects 'in language'. Overwhelmingly, Aboriginal people consulted felt that a greater focus on cultural learning would engage the children better, make them proud of their culture and heritage and help to keep them at school longer.¹⁰⁵ The Commission also notes that such cultural learning in schools with less significant Aboriginal populations might enhance tolerance of racial minorities and deflect the development of racist attitudes.

In addressing problems of chronic truancy, communities in Carnarvon reported past success with a 'truancy patrol' (apparently now defunct) which picked up children and delivered them to school. Recent initiatives in the region include a breakfast program at schools which is run by the Community Development

Employment Project (CDEP) (work-for-the-dole) scheme. There is also a reportedly successful policy in Carnarvon of shops not serving school-age children during school hours. In Meekatharra it was reported that the high school had developed certain programs to address truancy including the development of 'on-the-job' training as part of the curriculum which made education more directly relevant for some young people. The Commission notes that school attendance is currently a 'key focus area' of the Department of Education's Aboriginal Education Strategy.¹⁰⁶



103. A case study in a remote Indigenous community in the Northern Territory has found that 'for education to be successful and lead to sustainable outcomes, it must be integrated into the social and cultural framework of the community, and must include community goals and aspirations'. Kral I & Falk I, *What is All that Learning For? Indigenous Adult English Literacy Practices, Training, Community Capacity and Health* (Canberra: National Centre for Vocational Education Research, June 2004) 8.

104. Some reported that communities often felt remote from schools and that a greater effort should be made to involve communities, families and Elders in school activities, as guest speakers and as teachers' aides.

105. It is noted that the Department of Education has acknowledged that 'cultural alienation' is a significant factor in absenteeism and truancy of Aboriginal students and has developed strategies for schools to address this problem including the promotion and maintenance of a 'culturally inclusive curricula'. The success of these strategies is not known. See Department of Education, Aboriginal Education Strategy, *Creating the Vision 2001–2004* (2002) 20, 26.

106. Ibid 20.

Despite problems with Indigenous participation in primary and secondary schooling, Department of Education, Science and Training (DEST) statistics show that there has been a 58 per cent increase in Indigenous students in tertiary education over the past decade.¹⁰⁷ In Western Australia in 2002 there were 1,540 Indigenous students in Western Australian tertiary education institutions which represents approximately 2.4 per cent of the state's total Indigenous population.¹⁰⁸ Only Victoria (with approximately 3.1%) and the Australian Capital Territory (with approximately 5%) performed better than Western Australia in this respect. Nevertheless, there were some complaints about the lack of (opportunity for) Indigenous participation in higher education from some communities consulted.¹⁰⁹ In many instances, access to tertiary education is limited by remoteness and deficiency in formal education; however, there appear to be a growing number of programs in Western Australian universities which enhance access to degree courses for Indigenous students and are appropriately targeted to the regions. The Commission encourages the continuing development of alternative access strategies and culturally appropriate mentoring programs for Indigenous students in the full range of disciplines.

Vocational Training

Vocational education and training (VET) is popular with Indigenous Australians (particularly young Indigenous Australians) with participation rates recorded at twice that of non-Indigenous students.¹¹⁰ Participation rates of Indigenous students in rural and remote areas are considerably higher than those of non-Indigenous students; although they fall to half that of non-Indigenous students in metropolitan areas.¹¹¹ However, despite high participation rates, Indigenous students are more likely to fail or withdraw from courses than their non-Indigenous counterparts.¹¹²

The rate of failure and withdrawal, particularly in rural and remote communities, may well be linked to the relevance of VET courses to the employment opportunities (or lack thereof) offered in these areas. Some communities consulted for this reference spoke of the need for increased VET opportunities,¹¹³ particularly in fields that have local relevance (such as the mining industry, engineering, mechanics, healthcare, etc).

A case study in a remote Indigenous community in the Northern Territory has found that the connection between mainstream 'education, vocational education and training and employment pathways is not linked to any future planning process that takes account of community aims and aspirations'.¹¹⁴ The study suggests that the need for integration of VET into the social and cultural framework of individual communities is emphasised by the 'increasing pressure' upon Aboriginal communities 'to build sustainable communities with a social, cultural and economic capital base, and share responsibility [with government] for community wellbeing and capacity building'.¹¹⁵ The authors of the study recommend that 'policy changes are needed that recognise the inherent differences between localities in Indigenous Australia and accept that education and training needs are not necessarily the same for all remote communities'.¹¹⁶ At the same time, recognising that the majority of jobs available in remote communities are offered under the government-subsidised CDEP, there is a need to 'harness the training potential of the CDEP and capitalise on existing culturally appropriate labour market opportunities'.¹¹⁷

Employment

There is a considerable difference in labour force participation rates between Indigenous (54%) and non-Indigenous (73%) Australians in the 15–64 age group.¹¹⁸ In Western Australia, the 2001 Census recorded a total of 14,477 employed Indigenous

107. ABS, 'Indigenous Education and Training, 2004 Year Book Australia (Canberra: ABS, 2004) 315, 319.

108. Ibid. The proportion of female Indigenous higher education students was higher than that of males (at 64%).

109. In the Pilbara, for instance, it was said that there was no known young person from an Aboriginal community in the region who had progressed to tertiary education.

110. Saunders J, Jones M, Bowman K, Loveder P & Brooks L, *Indigenous People in Vocational Education and Training: A statistical review of progress* (Canberra: National Centre for Vocational Education Research, September 2003) Executive Summary.

111. Ibid, table 1.

112. Ibid, Executive Summary.

113. Including VET opportunities offered in prison that are more relevant to employment opportunities offered in or near the participants' communities.

114. Kral I & Falk I, *What is All That Learning For? Indigenous Adult English Literacy Practices, Training, Community Capacity and Health* (Canberra: National Centre for Vocational Education Research, June 2004) 8.

115. Ibid.

116. Ibid.

117. Ibid.

118. ABS, 'Labour Force Statistics of Aboriginal and Torres Strait Islander Peoples', 2004 Year Book Australia (Canberra: ABS, 2004) 175, 176.

persons above the age of 15 years.¹¹⁹ In comparison, the number of non-Indigenous employed Western Australians was 809,325.¹²⁰

According to the 2001 Census, the majority of working Indigenous Western Australians¹²¹ were employed in government administration or defence jobs (3,583). The next most popular field of employment was health (1,520) followed by 'personal and other services' (1,387) and education (1,266).¹²² The Commission's community consultations indicated that Aboriginal people believed that there should be greater Aboriginal involvement and employment opportunities in the frontline delivery of health, education, justice, law enforcement and welfare services, particularly in the regions.¹²³

Employment opportunities for Aboriginal people, especially in the regions, are commonly understood to be limited. Typical justifications for this are poor levels of education, remoteness of communities, discouragement of job-seekers, ease of access to welfare benefits and simple unavailability of jobs. Despite this, a recent analysis of Indigenous labour force statistics in Australia showed that Indigenous Australians are more motivated to work than other Australians and are typically not concerned that their welfare payments will be affected.¹²⁴ Studies have also found that for Indigenous Australians 'the social environment is a particularly important determinant of labour supply'.¹²⁵

The presence of other employed adults in a household increases labour supply and reduces unemployment. Among males, if other people in the household are employed, the chance of unemployment falls by 14.7 percentage points. This is counterbalanced by a larger increase in the probability of employment ... In contrast, unemployment among adults in a household is associated with a lower probability of supplying labour, higher unemployment probabilities and lower employment probabilities, both in CDEP and non-CDEP employment.¹²⁶

This analysis reinforces the need to address Indigenous disadvantage with an holistic focus, using a whole-of-



government approach to improve the social and cultural health of Indigenous communities.

CDEP

Of the 14,477 employed Indigenous Western Australians reported above, some 4,545 are employed on CDEP (or subsidised employment schemes).¹²⁷ At just over one-third of employed Indigenous persons, the number employed on CDEP represents a significant proportion of the Western Australian Indigenous labour force.

The valuable role that the CDEP scheme plays, particularly in rural and remote communities, should not be underestimated. Apart from providing a diversity of employment and training, where such opportunities are otherwise considerably limited, the CDEP scheme

119. ABS, 'Indigenous Profile: Western Australia', *2001 Census of Population and Housing* (2002) Table 16A.

120. Ibid, Table 16B.

121. Apart from those employed on the CDEP program.

122. ABS, 'Indigenous Profile: Western Australia', *2001 Census of Population and Housing* (2002) Table 17.

123. The need for more people to be trained and employed as Aboriginal language interpreters was also mentioned.

124. Hunter B & Gray M, 'Family and Social Factors Underlying the Labour Force Status of Indigenous Australians' (2002) 62 *Family Matters* 18, 20–21.

125. Ibid 24.

126. Ibid.

127. ABS, 'Indigenous Profile: Western Australia', *2001 Census of Population and Housing* (2002) Table 16A.

enables communities 'to access substantial blocks of funds and resources to customise activities and enterprises and thus improve the physical and social environments of local communities'.¹²⁸ The CDEP scheme also provides an alternative to welfare benefits that some Aboriginal leaders believe are too accessible for Aboriginal youth and inevitably lead to family and community breakdown.¹²⁹

However, Aboriginal communities in the Great Southern region suggested that the CDEP scheme did not provide sufficient encouragement to work and that it simply 'distorted the unemployment figures'. There was concern expressed that the only requirement of the CDEP scheme was to 'turn up' and that there was little incentive to work hard and learn new skills. It was suggested that there should be the opportunity to work a number of hours per week with a private employer and the remaining on CDEP. Recent research on the scheme suggests that CDEP could 'assist by offering employers financial support to provide external employment for participants'.¹³⁰ However, it was also noted that 'the movement of participants into unsubsidised employment is difficult in rural and remote areas' and that the scheme was limited in the solutions it could offer for the high rates of unemployment in these areas.¹³¹

Housing and Living Conditions

Aboriginal people represent a large proportion of the hidden homeless, in temporary accommodation or staying with relatives. Overcrowding in particular exacerbates health problems, increases the likelihood of damage to property leading to debt and eviction,



and creates social conditions conducive to family violence and child abuse.¹³²

Problems with public housing

A significant factor affecting the social and emotional wellbeing, and indeed the physical health and personal safety, of Aboriginal people in Western Australia is the lack of adequate public housing.¹³³ The 2001 Census of Population and Housing showed that there was an average of 3.7 persons in Indigenous households compared with 2.6 persons in other households.¹³⁴ This figure rose to 5.3 in remote areas of Australia.¹³⁵ These statistics, however, fail to adequately convey the reality of overcrowding in Indigenous households reported to the Commission during its consultations. Many respondents stressed the inadequacy of public housing to deal with the large number of people usually resident in each house. The obligations imposed on Aboriginal families by customary law to accommodate large numbers of their extended families means that overcrowding in homes is the norm rather than the

128. Ibid.

129. Koch T & Emerson S, 'Ban Black Kids' Dole: Pearson', *The Weekend Australian*, 11–12 September 2004, 2. The story features an interview with Queensland Aboriginal activist Noel Pearson.

130. Misko J, *The Role of Community Development Employment Projects in Remote and Regional Communities* (Canberra: National Centre for Vocational Education Research, August 2004) Executive Summary.

131. Ibid.

132. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 186.

133. Patrick Dodson's Regional Report of Underlying Issues in Western Australia, prepared for the Royal Commission into Aboriginal Deaths in Custody, states that '[p]articipants were unanimous in nominating housing as the major issue for Aboriginal people' in Western Australia. That report also outlines the history of housing policies and Aboriginal people in Western Australia. See RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [13].

134. ABS, 'Indigenous Profile: Western Australia', 2001 Census of Population and Housing (2002) Table 29.

135. HREOC, 'A Statistical Overview of Aboriginal and Torres Strait Islander Peoples in Australia', <http://www.hreoc.gov.au/social_justice/statistics> 14.

Overcrowding exacerbates health problems, increases the likelihood of damage to property leading to debt and eviction, and creates social conditions conducive to family violence and child abuse.

exception.¹³⁶ This problem is exacerbated when Aboriginal families are evicted from their homes as they often have no choice but to impose upon other family members for shelter.¹³⁷ Because of large waiting lists for public housing (and because staying with relatives is considered a 'viable housing option' by Homeswest – leading to a lesser level of priority status for housing assistance) the imposition on family members can extend for a significant period.¹³⁸

In her background paper for this reference Kathryn Trees reports that in Roebourne it is not unusual that between 17 and 20 people live in a single house.¹³⁹ Conditions such as these pose considerable risk to people's physical health. Some infectious and other diseases which are rife amongst northwest Aboriginal communities have barely been seen in Australia's non-Indigenous population for 90 years.¹⁴⁰ Medical and environmental health experts believe that these health problems are primarily the result of overcrowded and inadequate housing, poor diet and unsatisfactory social infrastructure such as sewerage, water supplies and waste disposal.¹⁴¹

In addition, the problem of overcrowding in Aboriginal households places women and children at greater risk to their personal safety.¹⁴² Trees reports that in Roebourne 'there is no privacy and no space for children

to be away from adults or for women to be alone'.¹⁴³ Disturbingly, Trees also reports:

A young woman in her twenties who I spoke with said that the inadequate housing makes it impossible to keep people who have been drinking away from the children. Older women have confirmed this. The young woman said that everyone may be in the yards and on the streets, playing with the other kids until after dark but when they go inside they cannot isolate themselves from the drinkers and often they will not know that they need to try and do this. She said this often results in neglect, family violence and sexual abuse of women and children. As one older woman said: 'They might just crawl over people and get to a girl. They don't even know what they are doing'.¹⁴⁴

Trees' background paper echoes the concerns of the *Report of the Royal Commission into Aboriginal Deaths in Custody* (RCIADIC) where the impact on Indigenous families of housing shortages was made clear:

Grossly overcrowded housing—particularly when associated with excessive drinking—creates a context for domestic violence. Women and children are primarily the subjects of this violence, and men are arrested. Other consequences that may follow include children being unable to sleep or eat properly. This situation in turn contributes to child malnutrition and high truancy rates.¹⁴⁵

136. The 2001 Census counted 981 multi-family households in Western Australia containing 7,794 people, making an average of eight people in each multi-family household (compared with an average of 5.2 in non-Indigenous multi-family households). Of those Indigenous families living in separate dwellings, 314 of the dwellings housed more than 10 people, the majority of which only have three bedrooms (169). See ABS, 'Indigenous Profile: Western Australia', 2001 Census of Population and Housing (2002) Tables 21 & 24.

137. This dependence on family for accommodation (which leads to overcrowding) is considered a 'secondary form of homelessness'. See Shelter WA, *No Place Like Home: Homelessness in Western Australia* (December 2004) 7–8.

138. It should be noted that '[b]ecause of Homeswest's "rent to income ratio" policy, a host family must pay extra rent to cover relatives who stay. This can lead to paradoxical cases where tenants are forced to pay much higher than market value rent on their homes': Equal Opportunity Commission, *Finding a Place: An Inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people in Western Australia*, DVD (December 2004). 'Homeswest' is the name of the Western Australian Department of Housing and Works' public housing tenancy service.

139. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2003) 10. Similar conditions have been reported in Balgo where it has been said that 'about 12 people and half a dozen dogs' live in each house: Harvey A, 'Inside Australia's Shame', *Sunday Times*, 5 September 2004.

140. Such as acute rheumatic fever, a preventable communicable disease that can lead to rheumatic heart disease – a serious contributor to mortality rates of Aboriginal people in Australia. See: 'Stories from a Children's Hospital – Outreach', Catalyst, ABC, 4 November 2004.

141. Ibid. See also SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 10.1.

142. As detailed in the supporting evidence to WA's Gordon Inquiry: Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002).

143. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2003) 10.

144. Ibid 26.

145. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (Canberra: Australian Government Publishing Service, vol 2, 1991) as cited in Shelter WA, *No Place Like Home: Homelessness in Western Australia* (December 2004) 7–8.

These problems are not confined to remote communities in Western Australia.¹⁴⁶ The Commission's consultations recorded similar issues of overcrowded public housing with metropolitan Aboriginal families. When asked for their ideas for resolving problems in this area, Aboriginal communities suggested that public housing authorities needed to adjust their planning policies to 'reflect the realities' and suit the specific needs of Aboriginal families.¹⁴⁷ They said that Indigenous households required more than five bedrooms or attached 'granny flats' to accommodate extended families in need with minimal disruption to the established family home.

Overcrowding can lead to allegations of antisocial behaviour against Aboriginal tenants and this may be used by Homeswest to justify the eviction of Aboriginal families.¹⁴⁸ The Equal Opportunity Commission (EOC) has heard stories of evictions for antisocial behaviour following reports of domestic violence, complaints of too many children or cars on the property and behaviour of visitors.¹⁴⁹ Consultations with the community in Armadale suggested that problems of antisocial behaviour could be better resolved through mediation and family conferencing rather than eviction, which simply exacerbates the problem and potentially moves it to another location. A submission to the EOC said:

Evictions should be a last resort. A lot of it could be sorted out other ways. Eviction only causes overcrowding somewhere else. There are no steps to try and sort things out first. Evictions break families up, interfere with children's school, cause health problems.¹⁵⁰

In relation to eviction the Commission makes special note of the observations of the United Nations Committee on Economic, Social and Cultural Rights (CESCR) which in 1997 remarked that Indigenous peoples 'suffer disproportionately from the practice of

forced eviction'.¹⁵¹ CESCR also highlighted that the non-discrimination provisions of the *International Covenant on Economic, Social and Cultural Rights* (ratified by Australia) 'impose an additional obligation upon governments to ensure that, where evictions do occur, appropriate measures are taken to ensure that no form of discrimination is involved'.¹⁵²

Discrimination in the provision of public housing

Provision of public housing in Western Australia is the responsibility of the Department of Housing and Works (DHW) and its tenancy services arm, Homeswest. It has been reported that despite Aboriginal people making up a relatively small proportion of the population of Western Australia, Indigenous tenants represent 18 per cent of tenants in public housing supplied by the DHW.¹⁵³ During its consultations with Aboriginal people in Western Australia, the Commission heard a number of complaints about unfairness and discrimination by the state's public housing body. Since 1985 the EOC has also received 'persistent heavy rates of complaints by Aboriginal people about their access to public housing',¹⁵⁴ many of which allege racial discrimination. The EOC has recently released the findings of a two-year investigation into the DHW, which assessed whether the department's policies, practices, decision-making and appeal processes directly or indirectly discriminate against Aboriginal people on unlawful grounds. The submissions to the EOC inquiry make for harrowing reading and provide a window into the problems facing many Aboriginal people living in public housing in Western Australia. Chapter 13 of the report identifies the major issues and themes that emerged from these submissions, including:

- the provision of substandard accommodation to Aboriginal people (which, if knocked back, may result in the applicant being removed from the waiting list);¹⁵⁵

146. For a full statistical understanding of overcrowding in Western Australia, see Shelter WA, *No Place Like Home: Homelessness in Western Australia* (December 2004) 9 (Table 1: 'Overcrowding by ATSI Region and Indigenous Status').

147. It is noted, however, that Western Australia has developed its own *Code of Practice for Housing and Environmental Infrastructure Development in Aboriginal Communities* (Environmental Health Needs Coordinating Committee Inter-governmental Working Group, 2000) which establishes building requirements specific to remote areas. See Etherington S & Smith L, 'The Design and Construction of Indigenous Housing', *2004 Year Book Australia* (Canberra: ABS, 2004) 553–55.

148. Equal Opportunity Commission, *Finding a Place: An inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people in Western Australia* (December 2004) 208–15.

149. *Ibid.*

150. *Ibid.* 200.

151. Committee on Economic, Social and Cultural Rights, *General Comment No 7 on the right to adequate housing: forced evictions* (20 May 1997) UN doc. E/C.12/1997/4.

152. *Ibid.*

153. Equal Opportunity Commission, *Investigation into the Provision of Public Housing to Aboriginal People in Western Australia*, Consultation Paper (2003) 2.

154. *Ibid.* 3.

155. In 2002 the Department of Housing and Works reported that 23 per cent of Indigenous public houses required major repairs with 11 per cent required replacement. Department of Housing and Works (WA), *An Agreement for the Provision of Housing and Infrastructure to Aboriginal and Torres Strait Islander People in Western Australia July 2002–June 2007* (2002) <http://www.dhw.wa.gov.au/abor/abor_agreement.pdf>.



- problems with transparency of direct debit payments for rental, maintenance and facilities;
- issues of accessibility of correspondence from DHW, especially where tenants may be illiterate;
- non-Aboriginal people allegedly receiving priority for public housing;
- segregation of Aboriginal tenancies (leading to creation of Aboriginal ghettos, especially in rural towns);
- extremely lengthy waiting periods for those with urgent housing needs, including women and children who are the subject of family violence (leading to overcrowding of relatives' homes or other forms of homelessness);
- experiences of racist attitudes or lack of respect by DHW and Homeswest staff;

- unacceptable delays with repairs and maintenance to properties (leaving some properties unsecured or posing a threat to physical health for long periods);
- concerns regarding tenant liability for property damage and wear and tear (which may be increased by overcrowding, itself caused by non-provision of housing and contributed to by Homeswest's viable housing options policy);¹⁵⁶ and
- eviction or termination of leases without attempts to resolve problems in other ways.¹⁵⁷

The EOC inquiry concluded that systemic discrimination against Aboriginal people did exist and that 'Aboriginal people experience disadvantage and less favourable treatment in relation to many aspects of public housing access, services and residence'.¹⁵⁸ The EOC made 165 recommendations for reform addressing all aspects of DHW services to Indigenous clients. It is too early to say whether the EOC report will result in any substantive reforms by DHW but the immediate responses to the report by DHW and the state government indicate that there is some considerable disagreement with the EOC's findings.¹⁵⁹ For its part, the Commission supports the implementation of recommended strategies for the promotion of cultural awareness of Indigenous Australians in the public housing sector and improvement of their current housing options and living conditions.¹⁶⁰ Such improvement, it is noted, forms the basis of many recommendations of the Gordon Inquiry as a means of addressing problems of family violence and child abuse in Western Australian Indigenous communities.¹⁶¹

Improving Indigenous housing in Western Australia

The Commission notes that Western Australia is party to a national strategy to improve Indigenous housing outcomes over a 10-year period and has signed an agreement with the Commonwealth government and Aboriginal Australia's former representative body ATSIC

156. These issues were also raised in the Commission's consultations in Carnarvon where it was said that damage was not repaired until the tenant filed a police report. Apparently this necessity caused problems for Aboriginal tenants who were unwilling to involve police for fear of being blamed for the damage or who were unwilling to implicate family members who might then face criminal charges for property damage. As a result of the failure to file a police report property damage remained unrepaired, unless the tenant was willing to pay. There was a suggestion by those consulted that Homeswest should consider reviewing this requirement.

157. Equal Opportunity Commission, *Finding a Place: An inquiry into the existence of discriminatory practices in relation to the provision of public housing and related services to Aboriginal people in Western Australia* (December 2004) Ch 13.

158. Ibid 239.

159. The Hon. Nick Griffiths, Minister for Housing and Works, 'State Government Backs Homeswest' (Media Statement, 15 December 2004). See also statements of DHW Executive Director Greg Joyce reported in 'Racist Officers Favour White Tenants', *The Australian*, 16 December 2004, 6.

160. In Part VI the Commission notes that recognition of the special duty under Aboriginal customary law to accommodate kin is necessary to the implementation of meaningful change to current public housing provision programs. See 'Recognition of Aboriginal Kinship Obligations', below p 272.

161. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) recommendations 49–62.

to pool state, Commonwealth and ATSIC housing and infrastructure funds and collaborate with Aboriginal communities to eliminate overcrowding and homelessness in Western Australia.¹⁶² Still, it must be remembered that it is now over a decade ago that the RCIADIC reported:

Complaints about housing from Aboriginal people in [Western Australia] are not rare, nor are they new, and again we find an area that has been well researched and documented, but where government has failed to act.¹⁶³

With the dissolution of ATSIC, a principal signatory to the housing and infrastructure agreement, the status of the agreement is yet unclear. However, in view of the ongoing inadequacy of public housing and unacceptably high rates of homelessness and the repercussions this has on the social, emotional and physical health of Indigenous Australians it is critical that this program continues and develops under the new state-Commonwealth Indigenous affairs arrangements and that tangible outcomes are delivered. The Commission therefore supports the recent recommendations of Shelter WA in its report *No Place Like Home: Homelessness in Western Australia* that funding should be increased under the Commonwealth-State Housing Agreement for the provision of social housing, that the capacity of the Supported Accommodation Assistance Program be increased to provide services in areas where need is located, and that the state government implement strategies to address overcrowding in Indigenous households.¹⁶⁴

Overcoming Indigenous Disadvantage

The preceding discussion of the Commission's consultation findings and of the issues that most concern Aboriginal people in Western Australia today place the proposals presented in this Discussion Paper into illuminating perspective. The extent of Indigenous disadvantage in this state is confronting, the statistics often shocking. However, none of these issues are new

– they have been recurrent themes in Australian Indigenous affairs for at least half a century.

During the Commission's consultations many Aboriginal people expressed their frustration with the constant consultations by government authorities and publication of reports and recommendations that appear to reap no substantive results. Similar frustrations were clearly expressed to the RCIADIC some 15 years ago. Speaking of the education system in his report prepared for RCIADIC, Patrick Dodson said:

There is probably nothing in the history of this country which has promised and denied so much to Aboriginal people than the education system. No other institution has made more attempts to assimilate, socialise and continue the process of colonisation ... At the same time no other institution has issued so many reports or made so many recommendations. People have been consulted, research projects initiated and Aboriginal people have said many times what they want, but despite the many proposals and suggestions over a number of years, it appears little has been heard and much is still to be done.¹⁶⁵

This statement could probably now be said of almost any government authority or agency. As can be gleaned from the discussion above, there have been a vast number of consultations, reports and recommendations by any number of bodies (state and federal) including the RCIADIC. The gaps between the expectations, substance and recommendations of these earlier reports and the achievement of actual positive outcomes for Indigenous Australians are of considerable concern to this Commission.

In 2002 the Council of Australian Governments commissioned the Steering Committee for the Review of Government Service Provision (SCRGSP) to produce a regular report which measures the efficiency and effectiveness of Indigenous policy and program outcomes against key indicators of Indigenous disadvantage. Those key indicators (and the disturbing statistics that support them) were published by SCRGSP in November 2003.¹⁶⁶ It is too early to know how

162. Housing Ministers' Advisory Council, *Building a Better Future: Indigenous Housing to 2010* (May 2001). See also Department of Housing and Works (WA), *An Agreement for the Provision of Housing and Infrastructure to Aboriginal and Torres Strait Islander People in Western Australia July 2002 – June 2007* (2002), <http://www.dhw.wa.gov.au/abor/abor_agreement.pdf>.

163. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol 1, 1991) [13.2].

164. Shelter WA, *No Place Like Home: Homelessness in Western Australia* (December 2004) 25. The Commission notes that housing issues (in particular, priority need and improved housing) are included as objectives in the recently circulated discussion draft of the Housing Strategy WA (undated); however, as yet no outcomes or actions have been established.

165. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol 1, 1991) [12].

166. The most recent report of the SCRGSP into Indigenous disadvantage is the 2005 Key Indicators Report, published after the writing of this section. However, the 2005 report draws on 2002 statistics (as opposed to the 2001 statistics of the previous report) and so does not appear to affect the information in this Part. In the overview to the 2005 report the SCRGSP notes that 'many of the indicators show little or no movement' while victim rates for crime, imprisonment rates and substantiated child notifications appear to have increased and labour force participation appears to have improved. See SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (July 2005) xx.

The extent of Indigenous disadvantage in this state is confronting, the statistics often shocking. However, none of these issues are new – they have been recurrent themes in Australian Indigenous affairs for at least half a century.

Western Australia has performed in respect of these key areas; however, SCRGSP have indicated that the focus will be on actual outcomes for Indigenous peoples and that this can only be achieved by employing a 'whole-of-government approach to meeting the needs of Indigenous people'.¹⁶⁷

It will be evident from what has preceded that this is an approach that the Commission supports. The current fragmentation of services to Indigenous Western Australians and the evident lack of communication between the agencies that deliver these services are clearly problematic. The Commission believes that it is vital that agencies work together to achieve real outcomes for Indigenous people. For instance, there is sufficient evidence that the typical overcrowding in Aboriginal houses is not simply a problem for the state housing authority: it is also a matter that affects health outcomes; education and employment figures; the rates of child abuse and family violence; and crime and substance misuse statistics. Overcoming these problems requires cooperation between each of these policy areas at all levels – state, regional and local. In practice this may mean the joint funding of cooperative programs, the holding of regular inter-agency conferences or the combined delivery of services in the regions. At the very least it imposes upon each agency the responsibility to constructively communicate with other agencies regarding Indigenous service delivery and to appreciate the potential capacity for input from other policy areas.

By proposing that government better facilitate the interaction of agencies and specialists that are currently responsible for the delivery of services to (and the development of policy for) Indigenous people in Western Australia, the Commission does not wish to detract from the importance of individual agencies delivering services within their particular areas of expertise. However, the Commission agrees with SCRGSP that:

Achieving improvements in the wellbeing of Indigenous Australians in a particular area will generally require the involvement of more than one government agency, and that improvements will need preventative policy actions on a whole-of-government basis.¹⁶⁸

The term 'whole-of-government' is an over-used term in modern politico-speak and has the potential of lapsing into meaningless platitude; but if there is one area of governmental focus that requires such a cooperative and coordinated response between government departments and information-sharing between different jurisdictions, it is that of Indigenous disadvantage. This includes the causes of Indigenous disadvantage (such as loss of traditional culture and identity stemming from colonial practices, marginalisation, poverty and unemployment) and the effects of Indigenous disadvantage (including intergenerational violence, child abuse, entrenched substance abuse, reduced life-span and health problems). Indeed, the cyclical nature of Indigenous disadvantage means that many of the causes and effects just mentioned may be interchangeable.

There is, therefore, a significant case for *meaningful and tangible* multi-agency cooperative responses to overcoming the very real problems of Indigenous disadvantage that exist in Western Australia.

Proposal 1

That the Western Australian government adopt a genuine whole-of-government approach to the delivery of services to Aboriginal people in Western Australia requiring the constructive communication between agencies at the state, regional and local levels and the consideration of cooperative multi-agency joint-funded programs to achieve real outcomes that effectively address the current state of Indigenous disadvantage in Western Australia.

167. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) xxii.

168. Ibid [2.1].

The success of the whole-of-government approach to addressing issues of Indigenous disadvantage in Western Australia will depend, in part, on the awareness and appreciation of government in regard to Aboriginal customary law and cultural issues. As the preceding discussion makes clear (particularly in relation to health services and public housing) the Commission's consultations revealed that the level of cultural awareness among Western Australian government agencies and service providers was an issue of considerable concern. The Commission has made specific proposals in Part V and Part IX, below, for resources to be made available for appropriate cultural awareness training programs to be developed for police, community corrections officers, prisons officers, judicial officers court staff and others. The following proposal relates to all Western Australian government departments, agencies and public service providers (as well as contractors and sub-contractors to those entities) to ensure that those staff who work directly with Aboriginal people are sufficiently aware of the local customary law and cultural issues that may affect their dealings with Aboriginal people or otherwise impact upon the effectiveness of service delivery to Aboriginal people.

Proposal 2

That employees of Western Australian government agencies who work directly, or have regular dealings, with Aboriginal people be required to undertake cultural awareness training. Such training should include presentations by Aboriginal people and be delivered at the regional level to allow programs to be appropriately adapted to take account of regional cultural differences and customs and concerns of local Aboriginal communities.

That consideration be given to agency-arranged cultural awareness training being a condition of the contract where contractors or sub-contractors to any Western Australian government agency are required to work directly, or have regular dealings, with Aboriginal people.

PART III

Recognition of Aboriginal Customary Law

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What is Aboriginal Customary Law?

Definitional Matters

The Commission's Terms of Reference require it to investigate whether 'there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws'. For the purposes of the discussion that follows in this paper it is necessary to address certain definitional matters, in particular the terms 'Aboriginal' and 'customary law'.

These matters have been considered in the past by the ALRC and NTLRC in the context of similar references. In these circumstances, rather than duplicating the work of these agencies, the Commission has taken their reports as a starting point to the consideration of these definitional matters in the Western Australian context.

'Aboriginal'

From its earliest days the Western Australian Parliament has employed a definition of 'Aboriginal' in relevant legislation. Originally the term 'native' was used to describe an Aboriginal person;¹ but, as the category of 'full-blood' native began to break down with the infamous success of government removal policies, the definition of Aboriginal person became more and more inclusive moving from 'half-caste' (that is, the child of a 'full blood' Aboriginal mother and a non-Aboriginal father) to 'quadroon' (the grandchild of a 'full-blood' Aboriginal woman).² It is now clear that as a consequence of government policies, racial integration and the passage of time there are now significantly varying degrees of biological descent amongst people who identify as Aboriginal. Perhaps for this reason, contemporary definitions of the term 'Aboriginal' are

beginning to involve cultural factors which have the capacity to broaden the scope of those who may claim Aboriginality³ and which give Aboriginal people some degree of control over who is accepted as Aboriginal.⁴

In 1985, a comprehensive survey of definitions of 'Aboriginal' or derivative terms in some 700 examples of Australian legislation noted that there were

no less than 67 identifiable classifications, descriptions or definitions [which] have been used from the time of white settlement to the present ... These classifications may be grouped under six broad headings: according to anthropometric or racial identification; territorial habitation, affiliation or attachment; blood or lineal grouping, including descent; subjective identification; exclusionary and other; and Torres Strait Islanders.⁵

In its report *The Recognition of Aboriginal Customary Laws*, published the following year, the ALRC concluded that it was

not necessary to spell out a detailed definition of who is an Aboriginal, and that there are distinct advantages in leaving the application of the definition to be worked out, so far as is necessary, on a case by case basis.⁶

The recent inquiry of the NTLRC expressly adopted the ALRC's view, considering it sufficient to accept the broad definition that:

An Aboriginal is a person of Aboriginal descent who identifies as an Aboriginal and is accepted as such by the community in which he lives.⁷

This view accords with the present judicial test of Aboriginality which is based on a combination of biological descent and cultural criteria.⁸ The discussion in Part II above⁹ addresses some of the concerns that face Aboriginal people in *proving* their Aboriginality for the

1. See for instance the *Aborigines Protection Act 1886* (WA).

2. The legislative history is laid out in some detail in: Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5206 ff (Mr Derrick Tomlinson).

3. The Commission acknowledges and agrees with the point made by Christopher Anderson that to claim or 'assert "Aboriginality"' is not to assume that Aborigines form a wholly coherent, unified body': Anderson C, 'On the Notion of Aboriginality' (1985) 15 *Mankind* 41, 42.

4. Nettheim G, 'Australian Aborigines and the Law' in *Law and Anthropology 2* (Vienna: VWGO, 1987) 371, 375.

5. McCorquodale J, 'The Legal Classification of Race in Australia' (1986) 10(1) *Aboriginal History* 7, as cited in Nettheim G, 'Australian Aborigines and the Law' in *Law and Anthropology 2* (Vienna: VWGO, 1987) 371, 373.

6. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [95].

7. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 10.

8. See eg, *Gibbs v Capewell* (1995) 128 ALR 577; *Shaw v Wolf* (1998) 163 ALR 205. This test is legislatively employed in many jurisdictions, most recently in Tasmania in the *Aboriginal Lands Amendment Act 2005* (Tas) s 3A.

9. See 'Aboriginality and Identity', above pp 30–31.

purposes of accessing government benefits and programs reserved for the exclusive benefit of Indigenous people. The question therefore arises whether a standard legislative definition of 'Aboriginal person' should be adopted for all purposes (legislative, administrative and judicial) in Western Australia.

There are a number of definitions of 'Aboriginal' found in current Western Australian legislation. For example, the *Aboriginal Affairs Planning Authority Act 1972* (WA) adopts, in s 4, the threefold test combining biological descent with the cultural criteria of self-identification and community acceptance mentioned above.¹⁰ However, for the purposes of Part IV of that Act (which provides for the distribution of intestate Aboriginal estates) a different definition is adopted which employs the protection era terminology of 'full-blood' and quarter-blood descent.¹¹ The *Family Court Act 1997* (WA) and the *Fish Resources Management Act 1994* (WA) speak in terms of membership of 'the Aboriginal race' – a definition which undoubtedly springs from the Australian Constitution but which would fall foul of the arguments raised by de Plevitz and Croft as discussed in Part II above.¹²

In recent amendments to the *Adoption Act 1994* (WA) a definition of 'Aboriginal person' based on descent alone was adopted. One of the reasons that Parliament adopted the simple descent test in this case was because children, in particular infants, cannot 'self-identify' as required by the threefold test.¹³ Another reason was that the government apparently believed that the 'three-tiered system [was] too rigorous and impose[d] limitations on people being able to legitimately claim their Aboriginality'.¹⁴ It was acknowledged in this regard that '[a]ny attempt to resolve the definition will be imperfect'.¹⁵

The example of the *Adoption Act* debates appears to support the ALRC's view that the definition of 'Aboriginal' should be left sufficiently vague as to be able to be determined on a case-by-case basis; however, the application of legislation by government departments and administrative authorities requires a degree of

certainty in definition. This must be so to ensure that administrative and departmental discretions are not abused and that all applications of legislation to Aboriginal people are not required to be determined by costly judicial process. Taking into account the arguments discussed in Part II 'Aboriginality and Identity', above, and being deeply conscious of the concerns of Aboriginal people, it is the Commission's preliminary view that a standard definition of 'Aboriginal person' in terms of descent should be adopted for the purposes of all Western Australian legislation. In order to ensure that the standard definition of 'Aboriginal person' is not unduly restrictive the Commission proposes that the following factors may be of evidentiary or probative value in determining whether a person is wholly or partly descended¹⁶ from the original inhabitants of Australia:

- genealogical evidence;
- evidence of genetic descent from a person who is an Aboriginal person;
- evidence that the person self-identifies as an Aboriginal person; or
- evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.¹⁷

The Commission considers that a broad definition of this nature will remove the difficulties in some circumstances of having to satisfy all three tiers of the threefold test whilst allowing cultural criteria to be probative in determining Aboriginality.¹⁸ The Commission believes that this could reduce the problems identified in Part II for those people who identify as Aboriginal but are unable to sufficiently prove their Aboriginality applying the threefold test whether for reasons of dislocation from their community or otherwise. The Commission stresses that the definition of Aboriginal person should be regarded as such only for the purposes of Western Australian legislation or application of government policy. The Commission recognises that identification as an Aboriginal person for social or cultural purposes must be determined by Aboriginal people alone.

10. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 4 reads: 'Aboriginal' means pertaining to the original inhabitants of Australia and to their descendants. *Person of Aboriginal descent* means any person living in Western Australia wholly or partly descended from the original inhabitants of Australia who claims to be an Aboriginal and who is accepted as such in the community in which he lives

11. *Ibid* s 33. See the discussion on succession in Part VI, below.

12. See Part II 'Aboriginality and Identity', above pp 30–31.

13. Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5214 (Ms Giz Watson). However, the threefold test has been recognised in adoption legislation in other jurisdictions and it is enough, for instance in New South Wales, for one parent to identify the child as Aboriginal.

14. Western Australia, *Parliamentary Debates*, Legislative Council, 13 March 2003, 5308 (Ms Ljiljana Ravlich).

15. Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 2003, 5214 (Ms Giz Watson).

16. It should be noted that no fixed proportion of descent (or 'blood-quantum') is identified.

17. The weight to be given to each or any of these factors is a matter for the decision-maker and may vary from case to case.

18. The Commission also observes that adoption of a standard definition will once-and-for-all remove the archaic and potentially offensive terminology that still exists in some Western Australian legislation.

It is the Commission's preliminary view that a standard definition of 'Aboriginal person' in terms of descent should be adopted for the purposes of all Western Australian legislation.

Proposal 3

That s 5 of the *Interpretation Act 1984* (WA) be amended to include the following standard definitions of 'Aboriginal person' and 'Torres Strait Islander person' for all written laws of Western Australia:

5. Definitions applicable to written laws

'Aboriginal person' means any person who is wholly or partly descended from the original inhabitants of Australia.

In determining whether a person is an Aboriginal person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is an Aboriginal person;
- (c) evidence that the person self-identifies as an Aboriginal person; or
- (d) evidence that the person is accepted as an Aboriginal person in the community in which he or she lives.

'Torres Strait Islander person' means any person who is wholly or partly descended from the original inhabitants of the Torres Strait Islands.

In determining whether a person is a Torres Strait Islander person the following factors are of probative value:

- (a) genealogical evidence;
- (b) evidence of genetic descent from a person who is a Torres Strait Islander person;
- (c) evidence that the person self-identifies as a Torres Strait Islander person; or
- (d) evidence that the person is accepted as a Torres Strait Islander person in the community in which he or she lives.

For the purposes of Western Australian written laws the term 'Aboriginal person' is taken to include a Torres Strait Islander person.

'Customary Law'

Providing a working definition of 'customary law', as it applies to Australian Aboriginal peoples, has historically proven difficult.¹⁹ Both the ALRC and the NTLRC reports refer to the difficulties that attach to the task and each appear to eschew a fixed definition, preferring instead to acknowledge that Aboriginal customary law exists but that it cannot be precisely delineated. With this the Commission broadly agrees. However, it is useful here to consider the question 'what is customary law?' with a view to achieving an understanding of the term in the Western Australian context.

What is customary law?

Black's Law Dictionary defines 'customary law' as:

Law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.²⁰

In its investigation of customary law in Aboriginal Australia the ALRC found that

there existed, in traditional Aboriginal societies, a body of rules, values, and traditions, more or less clearly defined, which were accepted as establishing standards or procedures to be followed and upheld.²¹

In its recent inquiry on the subject of Aboriginal customary law in the Northern Territory the NTLRC said:

Aboriginal members of the Committee and many others who have expressed their views, have emphasised Aboriginal [customary law] as an indivisible body of rules laid down over thousands of years and governing all aspects of life, with specific sanctions if disobeyed.²²

...

Aboriginal customary law is a fact of life for most Aboriginal people in the Northern Territory, not just

19. See the discussion on this issue in Amankwah H, 'Post-Mabo: The Prospect of the Recognition of a Regime of Customary Indigenous Law in Australia' (1994) 18(1) *University of Queensland Law Journal* 15, 20–22. See also McKenzie J, 'Recognition of Aboriginal Customary Law' (1993) 31(5) *Law Society Journal (NSW)* 37.

20. Garner B (ed), *Black's Law Dictionary* (Minnesota: West Group, 7th ed., 1999).

21. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [99].

22. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

those in Aboriginal communities. This is because it defines a person's rights and responsibilities, who a person is, and it defines a person's relationships to everybody else in the world.²³

During the Commission's consultations with Western Australian Aboriginal communities, Aboriginal people emphasised that their traditional 'law' was a part of everything, was within everyone and governed all aspects of their lives. In other words, customary law cannot be readily divorced from Aboriginal society, culture and religion. The Commission found that Aboriginal customary law, as it is understood and practised in Western Australia, embraces many of the features typically associated with the Western conception of law in that it is a defined system of rules for the regulation of human behaviour which has developed over many years from a foundation of moral norms and which attracts specific sanctions for non-compliance. But it was also clear that, in the words of one Aboriginal respondent, Aboriginal customary law

connected people in a web of relationships with a diverse group of people; and with our ancestral spirits, the land, the sea and the universe; and our responsibility to the maintenance this order.²⁴

So, whilst agreeing that the term 'customary law' cannot be (and on some arguments *should* not be) precisely or legalistically defined, the Commission favours an understanding of the term that encompasses the holistic nature of Aboriginal customary law which the Aboriginal peoples of Western Australia have shared with the Commission.

Aboriginal customary law: Is it 'law'?

A common debate among lawyers and legal anthropologists is whether Aboriginal customary law is indeed 'law' in the Western understanding of the term. A principal difference between Aboriginal law and Australian law is that Aboriginal law stems from an oral tradition—the substance of which is passed from generation to generation—whilst Australian law is posited in various constitutions, treaties, statutes and judicial decisions.

During the ALRC inquiry, the issue was raised as to whether the unwritten rules, values, traditions and



customs that make up Aboriginal customary law actually constitute a system of 'legal' rules and procedures (common in Western societies) as opposed to mere rules of etiquette or religious belief. Without providing an unequivocal pronouncement on this issue, the ALRC pointed to several legal and anthropological sources that supported the understanding that Aboriginal customary law is a system of law and stressed that there was a need to avoid the assumption 'that the supposed characteristics of "advanced" legal systems are necessarily shared by other systems'.²⁵

Another argument raised against treating customary law as law fixates upon the semantic definitions of each of these terms. In its recent report the NTLRC neatly encapsulated the debate as follows:

Under the general law, the term 'customary law' is a contradiction. 'Custom' and 'law' are regarded as two distinct concepts and never the twain shall meet unless and until 'custom' is converted into law by statute; in which case it ceases to be 'custom'. Certainly both 'custom' and 'law' have their sanctions but one is social and the other legal.²⁶

For the purposes of this reference the Commission believes that any distinction between the terms 'custom' and 'law', when dealing with Aboriginal customary law, is unduly restrictive and somewhat artificial. As both the ALRC²⁷ and the NTLRC²⁸ have observed, it is also a distinction wholly unknown or alien to Aboriginal culture.

23. Ibid 13 (footnote omitted).

24. Participant at the Manguri consultation. See Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 3.

25. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [100].

26. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

27. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [100] (with particular reference to Elizabeth Eggleston).

28. Ibid.

Traditional 'law' [is] part of everything . . . customary law cannot be readily divorced from Aboriginal society, culture and religion.

These sentiments are echoed by John Toohey in his background paper to this reference. In that paper Toohey warns:

Comparisons and contrasts between Aboriginal law and Australian law assume that there is some common understanding of what is meant by 'law' ... It is not just a matter of semantics, it goes much deeper than that. But even at the level of semantics many Aboriginal words do not translate readily into English, at least not without failing to convey the full flavour of the Aboriginal language.²⁹

Toohey argues that in the case of Aboriginal law the term 'law' should not be unduly coloured with Western concepts. The more acceptable approach in Toohey's estimation is to 'examine the society in question against the widest understanding of the term'.³⁰ To emphasise this point Toohey quotes Diane Bell and Pam Ditton:

In Aboriginal English the word 'law' is frequently used to encompass both the body of rules which are backed by religious sanctions and to explain the daily behaviour of peace abiding persons. *It is all the law*.³¹

This view sits comfortably with the Commission's understanding of Aboriginal customary law discussed above.

Does Aboriginal customary law still exist in Western Australia?

Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can't see it, but the table is still there.³²

Given the Commission's Terms of Reference, which expressly acknowledge the existence of Aboriginal

customary laws, the question 'does Aboriginal customary law still exist in Western Australia?' may appear somewhat redundant. However, there are those that might question the continuing existence of Aboriginal customary law in contemporary society, at least in its most potent pre-colonial form.

This emphasis on unbroken, continuing adherence to customary law most likely has its popular roots in the High Court's decision in *Mabo v Queensland [No 2]* where the court decided that the existence of Indigenous native title in land depended upon the claimants having

continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained ...³³

However, although requiring the maintenance of a traditional connection with the land the subject of a native title dispute (a burden which is undoubtedly strengthened by evidence of unchanging practice of traditional law), the court in *Mabo* acknowledged the inevitability of change in the practice of Aboriginal laws and customs.³⁴ This acknowledgement that Aboriginal customary law is constantly evolving and developing echoes the findings of the ALRC in its nationwide investigation of Aboriginal customary laws during the 1980s.³⁵

In the present investigation, the Commission found that the existence of Aboriginal customary law in Western Australia today is beyond doubt. It is, however, fair to say that traditional laws are more evidently in existence (or more overtly practised) in some Aboriginal

29. Toohey J, 'Understanding Aboriginal Law' (November 1999) 3 (footnote omitted). This previously unpublished paper is reproduced as an appendix to Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

30. Ibid.

31. Bell D & Ditton P, *Law: The Old and New* (Canberra: Aboriginal History, 1980) 22 as cited in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 5 (emphasis added).

32. Taken from an address by William Tilmouth (General Manager, Tangentyere Council, Alice Springs) to the 2002 Australian Institute of Judicial Administration Conference appended to NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 38.

33. *Mabo v Queensland [No 2]* (1992) 107 ALR 1, 43 (per Brennan J).

34. See Amankwah H, 'Post-Mabo: The Prospect of the Recognition of a Regime of Customary Indigenous Law in Australia' (1994) 18 *University of Queensland Law Journal* 15, 16. So much is clear from the parenthetical statement in the excerpt from the *Mabo* decision above.

35. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [99].

communities than in others. For example, for some Aboriginal people, particularly those living in remote communities such as Warburton, Aboriginal customary law is clearly a daily reality and it is Aboriginal law, not Australian law, which provides the primary framework for people's lives, relationships and obligations. On the other hand, amongst urban Aboriginal communities, the existence of Aboriginal customary law is less immediately evident. Nonetheless the Commission found that traditional law is still strong in the hearts of urban Aboriginals. As Harry Blagg and Neil Morgan have written:

Urban Aboriginal people, whom many (mistakenly) believe have lost all connection with law, still hold on to elements of culture and law through patterns of family obligation, loyalty and reciprocity, as well as attachment to surviving knowledge about places of significance and stories.³⁶

Is Aboriginal customary law 'frozen in time'?

Having acknowledged the continuing existence of Aboriginal customary law in Western Australia the question arises: should the Commission consider only those Aboriginal laws that appear 'frozen in time'³⁷ or unchanged by European contact? In the context of the present reference, the answer to this question has obvious consequences for the potential of recognition of Aboriginal customary law in the Western Australian legal system.

The fact that many Aboriginal customary laws have been found to have developed and changed over time has been noted above. It is the Commission's view that evolution, both in the substance of these laws and in their practice, is inevitable. Such dynamism is apparent even in the interpretation of formally posited law; with Aboriginal law change is unavoidable, both as a result of its oral tradition as well as the reality of over 200 years of colonial occupation. The issue has been addressed in sufficient detail in Toohey's background paper for this reference and does not need repeating here. It is sufficient to say that the Commission respectfully agrees with Toohey's conclusion that there is 'nothing [in the Commission's Terms of Reference] that ties recognition only to customary laws that have remained unaltered since white settlement'.³⁸

Evidence and Parameters of Customary Law in Western Australia

What Constitutes Customary Law?

Many non-Indigenous Australians associate Aboriginal customary law with 'payback' or traditional punishment that sometimes involves bodily harm; however, as will be clear from the preceding discussion Aboriginal customary law governs all aspects of Aboriginal life, establishing a person's rights and responsibilities to others as well as to the land and natural resources. For example, there are laws that define the nature of a person's relationship to others, including how or whether a person may speak to, or be in the same place as, another; laws that dictate who a person may marry; laws that define where a person may travel within his or her homelands; and laws that delimit the amount and type of cultural knowledge a person may possess. This list, of course, is not exhaustive.

As discussed in Part II of this paper, prior to significant European contact there were over 120 distinct tribes in existence in Western Australia, each possessing their own laws, customs and languages. Within regions, tribes tended to inter-marry and share resource agreements and understandings with neighbouring tribes leading to some similarity of laws. However, while there are common threads that unite Aboriginal laws across Western Australia, the diversity of laws (as with the diversity of Aboriginal peoples) must be stressed. Unlike Australian law, there is no single system of customary law that applies to all Aboriginal people.³⁹

Because of the differences in the laws of different tribal groups and the complex application of rules within Aboriginal kinship systems it is an impossible task to attempt an exhaustive list of what constitutes the substance of Aboriginal customary law. As one Aboriginal commentator has said of this task:

[I]t would be the height of absurdity for anyone but an Aboriginal to attempt to understand the complexity of customary law: I know this as an Aboriginal ... For we are not talking about reams of parchment that hold the wisdom of a few hundred years of British justice but about a complex philosophical and religious way of

36. Blagg H & Morgan N, 'Aboriginal Law in Western Australia' (2004) 6(7) *Indigenous Law Bulletin* 16, 17.

37. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 13.

38. *Ibid.*

39. McKenzie J, 'Recognition of Aboriginal Customary Law' (1993) 31(5) *Law Society Journal (NSW)* 37.

Aboriginal customary law governs all aspects of Aboriginal life, establishing a person's rights and responsibilities to others as well as to the land and natural resources.

living that has been carefully preserved and passed down through countless generations.⁴⁰

The impossibility of this task has also been recognised by others. In its recent inquiry into Aboriginal customary law in the Northern Territory the NTLRC concluded that the interpretation of what constitutes Aboriginal customary law is properly left to 'the Aboriginal people themselves who have had centuries of knowledge and practice behind them, of which others can have very little concept'.⁴¹

It is not the task of this Commission to exhaustively define the substance of Aboriginal customary law. Whilst Aboriginal people consulted for this reference have been very generous in sharing their traditional laws and cultural practices, the Commission recognises that there are many laws that are subject to strict secrecy rules

that prohibit their discussion. The Commission is therefore not in a position to identify with any precision the scope or substance of Aboriginal law in Western Australia. In these circumstances the Commission adopts the NTLRC's view that the issue of what constitutes Aboriginal customary law should be left to Aboriginal people themselves; in particular, those people in each Aboriginal community whose responsibility it is to pronounce upon and pass down the law to future generations.

Who is Bound (and Who Should be Bound) by Customary Law?

The diversity of Aboriginal people and their geographical location in Western Australia necessarily impacts upon the application of Aboriginal customary laws to their daily lives. Some live in remote communities with little interaction with non-Indigenous Australians and where Australian law has much less influence than Aboriginal law. Others live in discrete Aboriginal communities near regional centres where the necessity of bridging two cultures and two laws presents significant challenges. And still others live and work in urbanised environments with constant interaction with non-Indigenous people and, whilst they undoubtedly take pride in their Aboriginal heritage, they accept Australian law as the primary framework for defining their legal rights and obligations. Because of this broad spectrum of Aboriginal realities the question 'who is bound (and who should be bound) by customary law?' is raised.

In the Commission's community consultations for this reference, responses to this question varied. Some suggested that being involved in Aboriginal law today is a choice for families based on their circumstances and their beliefs. However, the Commission was warned that



40. Riley R, 'Aboriginal Law and Its Importance for Aboriginal people: Observations on the task of the Australian Law Reform Commission' in Morse B & Woodman G (eds) *Indigenous Law and the State* (Dordrecht: Foris Publishing, 1988) 65, 68.

41. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 12.

Aboriginal people needed to be consistent about their choice – they should not simply be allowed to ‘opt in’ or ‘opt out’ of Aboriginal customary law when it was convenient to them. Others suggested that those Aboriginal people who did not live in the traditional way should not be subject to Aboriginal law at all; yet they stressed that this did not mean that those people do not have respect for Aboriginal law or that they opposed its recognition within the Western Australian legal system. There was also the suggestion that, when people who were not ordinarily subject to Aboriginal law visited traditional Aboriginal lands, they should consider themselves bound by the law practised there.

The NTLRC faced the same issue in its recent inquiry into Aboriginal customary law in the Northern Territory. Recognising the difficulties with the diversity of circumstances of Aboriginal people in that jurisdiction the Committee concluded:

There are some Aboriginal people who choose not to live their lives in accordance with traditional law, but do not fully live in accordance with Australian law. These people inevitably have to make a choice to live within the general law, or to live within the traditional law rules of their communities. Either choice will have its problems and it is not suggested that there is any role that the recognition of Aboriginal customary law, as recommended by the Committee, can play in respect to this issue. This may sound pessimistic but it is also, realistic.⁴²

These comments suggest an ‘opt in/opt out’ approach. However, the NTLRC confined its recommendations almost solely to matters affecting discrete Aboriginal communities⁴³ with the objective of recognising and strengthening ‘the ability of traditional law to assist with law and justice issues’ on those communities.⁴⁴ In the Northern Territory where Aboriginal communities are more often located in remote areas, community boundaries are more clearly defined and there is overt ongoing practice of traditional law,⁴⁵ the problems presented by the ‘opt in/opt out’ approach will be less

than might be experienced by the majority of Aboriginal communities in Western Australia. In the words of the NTLRC:

It is emphasised that the whole concept must be based on voluntariness and no person should be forced into the [traditional law] compact against his or her will. On the other hand the communities have the right, which in many cases they already exercise, of expelling a person who does not wish to be bound by the compact or at least denying that person the advantages of belonging to the community. This is not as drastic as it sounds, because it appears that many Aboriginals in most communities would wish to conduct their affairs within the traditional law, and there is no reason why an Aboriginal person who does *not* wish to be so bound should expect to receive the rights and responsibilities under traditional law. There is a free choice and the option to merge into the more general society of the Territory should carry with it the responsibility of accepting that free choice. No doubt there will be some who will wish to move within both worlds and that should be a matter for the community to the extent to which they are prepared to accept such a situation.⁴⁶

Although, in this Discussion Paper, the Commission has introduced proposals for reform and recognition of customary law that go much further than those made by the NTLRC, the Commission agrees with the NTLRC that voluntariness should be the guiding principle in application of customary law to individuals. Just as it is not the Commission’s place to determine the precise nature and content of customary law, it is not its place to dictate who should or should not be bound by that law. That is a matter for Aboriginal people: communities and individuals. The proposals for reform that follow will, if implemented, entrench in Western Australian laws a respect for the laws of Aboriginal peoples that preceded them. It is hoped that these reforms will benefit all Western Australian Aboriginal people regardless of their place of residence, their way of living or their degree of connection to Aboriginal customary law.

42. Ibid 14.

43. Ibid.

44. Ibid 18. It should be noted here that the ALRC had significant reservations about restricting the application of Aboriginal customary law (in so far as its recommendations for recognition proposed) to certain geographical boundaries, such as the boundaries of a particular Aboriginal community. Such restrictions, it argued, could render the recognition of Aboriginal customary laws ineffective. There was also evidence that many Aboriginal people still considered themselves bound by Aboriginal customary law outside of their communities. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [124].

45. Indeed the NTLRC reports that ‘[t]wo thirds of all Aboriginal people in the Northern Territory live outside urban areas in small communities on Aboriginal land or special purpose leases or on pastoral leases’. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 6.

46. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 20.

Recognition of Aboriginal Customary Law

The Commission's Starting Point

The Terms of Reference require the Commission to consider whether 'there may be a need to recognise the existence of, and take into account within [the Western Australian] legal system, Aboriginal customary laws'. This means that the starting point for the Commission's consideration of the potential for recognition of Aboriginal customary law must be the current Western Australian (and Australian) legal system. As Toohey has aptly observed:

No doubt the language [of the Commission's Terms of Reference] was carefully chosen to make it clear that the framework within which the Commission is to operate does not include recognition of customary laws as a legal system operating independently of the State's legal system but rather as dependent upon recognition *within* that system.¹

Whilst this may appear to curtail the Commission's investigation, this has not proven to be the case. The Commission's consultations with Aboriginal people in Western Australia have shown a clear consensus against the operation of two separate systems of law, which many considered would be an unnecessarily divisive outcome. Many Aboriginal people have emphasised the need for striking a balance between Aboriginal and non-Aboriginal law and facilitating a harmonious relationship between Indigenous and non-Indigenous Western Australians.

It should be noted that the ALRC (which was ostensibly under no such restriction and considered the matter in detail) came to the conclusion that separate formal systems of law should be avoided. This was a conclusion that the NTLRC also shared. Indeed, there are persuasive reasons why Aboriginal customary law cannot be recognised to the exclusion of Australian law as a separate formal system. As the NTLRC has observed:

Australian law deals with many things that traditional law does not (eg: consumer protection laws relating to

unsafe toys or faulty motor vehicles; workers' compensation law; sale of goods, commercial contracts and so on) – so, for practical purposes, the option of *only* traditional law applying in an Aboriginal community denies some legal rights to Aboriginal people.²

The need to ensure that all Australian citizens enjoy the full protection of Australian law and the rights and obligations that such law confers is a matter that the Commission believes to be of paramount importance in the present reference.

Should Aboriginal Customary Law be Recognised?

The ALRC's 1986 report *The Recognition of Aboriginal Customary Laws* included a chapter on the subject of recognition in which arguments in favour of and against recognition of Aboriginal customary laws were noted. In a background paper to its 2003 report, the NTLRC conveniently summarised these arguments as follows:

The ALRC noted a number of arguments in favour of greater recognition of Aboriginal customary law:

- recognition would advance the process of reconciliation between Aboriginal and non-Aboriginal [people]
- non-recognition can lead to injustice in specific situations where traditional law governs a person's conduct
- the present legal system has failed to deal effectively with many Aboriginal disputes and there are disproportionately high levels of Aboriginal contact with the justice system
- traditional authority may be more efficient in maintaining order with Aboriginal communities, and thus be more cost-effective
- courts are recognising Aboriginal customary law within their discretionary powers, and more formal recognition would clarify the law
- non-recognition is consistent with principles of 'assimilation' and 'integration', whereas principles

1. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 2 (emphasis added).
2. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 15.

of 'self-management' or 'self-determination' are more appropriate

- Australia's international standing and reputation would benefit from its giving recognition to the laws and traditions of its indigenous peoples.

The ALRC Report identified a number of arguments against recognition:

- customary law may incorporate rules and punishments that are unacceptable to the wider Australian society
- some aspects of customary law are secret, and disclosure on a confidential basis is inconsistent with the judicial function within our legal system
- Aboriginal people may lose control over customary law if it were incorporated within the general legal system
- customary law may not adequately protect Aboriginal women
- recognition of customary law might create 'two laws' within our society
- Aboriginal customary law may no longer be relevant to some Aboriginal people, and some may prefer the present legal system
- recognition should be restricted to those Aborigines living in a strictly traditional manner.³

The arguments proffered against recognition of Aboriginal customary law encompass several themes, including: the different philosophical bases of Aboriginal law and Australian law (for example, communitarianism versus individualism and spiritual religious versus secular);⁴ the requirement of equality before the law (that is, the problems posed by the operation of two distinct and separate systems of law in Australia); the regional variation of Aboriginal law and the diversity of peoples to whom it applies; the issue of reconciling certain traditional punishments and offences with fundamental international human rights norms; the problem of codifying or writing down laws that historically exist in unwritten form; and the problem of establishing the nature and scope of Aboriginal law in the face of secrecy and other prohibitions to knowledge. These matters are discussed in some detail by Greg McIntyre in his background paper⁵ to this reference; it is therefore unnecessary to repeat them here.

Following careful consideration of the arguments listed above the ALRC concluded that there was a strong case for recognition of Aboriginal customary laws 'to avoid injustice and to acknowledge the reality of Aboriginal traditions and ways of life'.⁶ Although, as discussed in the Introduction to this paper, there has been very little done by governments to formally implement the ALRC's recommendations for recognition, much has happened in the intervening period to raise expectations of fuller recognition of Aboriginal customary laws in Australia.

Instances of common law recognition of Aboriginal customary laws in Australia in the past two decades are discussed below;⁷ as well, there is increasing evidence of 'willingness by governments to legislatively recognise the reality of customary laws for many Aboriginal people, whether actively practised or seen as an integral part of their culture'.⁸ This willingness has undoubtedly gained momentum from the Commonwealth government's statutory recognition of native title following the *Mabo* case, in which the strength of customary laws in the Meriam community of Murray Island played an important part. The Terms of Reference given to the NTLRC and to this Commission also demonstrate the willingness of some governments to address this issue. In these circumstances and after consideration of the arguments in favour of and against recognition of Aboriginal customary laws in the Western Australian context, the Commission concurs with the views of the ALRC and NTLRC that Aboriginal customary law should be appropriately recognised.

How Should Aboriginal Customary Law be Recognised?

Jurisdictional Limitations

Having reached the conclusion that Aboriginal customary law should be recognised in Western Australia, the question arises, 'How should this be achieved?' In considering this question it is important to understand that there are jurisdictional limitations upon the capacity of the State of Western Australia to recognise Aboriginal customary law. Thus, as Toohey has noted:

3. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 6 (footnote omitted.)
4. See McLaughlin R, 'Some Problems and Issues in the Recognition of indig Customary Law' (1996) 3(82) *Aboriginal Law Bulletin* 4.
5. McIntyre G, *Aboriginal Customary law: Can it be recognised?*, LRCWA, Project No 94, Background Paper No 9 (December 2004).
6. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [194].
7. See below, 'Common law or judicial recognition'. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003).
8. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 3.

Many Aboriginal people believed that amendments to laws and policies were not as meaningful without the fundamental respect for Aboriginal peoples and their laws that could be brought about by constitutional change.

The notion of a treaty or an agreement between indigenous and non-indigenous Australians or, as it is sometimes put, between the two peoples of this country, is not part of the Commission's remit.⁹

There are other jurisdictional restrictions on Western Australia pertaining to particular areas of law within the Commonwealth domain and these are discussed in the Parts following. Australia also has obligations under international covenants ratified by the Commonwealth to which the Commission must have regard in considering the recognition of Aboriginal customary law in Western Australia. That is a matter taken up in detail in Part IV – 'Aboriginal Customary Law in the International Law Context'. For now, it is the Commission's preliminary view that recognition of Aboriginal customary law can, and should, take different forms in the Western Australian context. The potential forms of recognition within the Western Australian legal system are dealt with below.

Constitutional Recognition

Respect for [Aboriginal customary law] is like the Constitution: it is right at the bottom of law.¹⁰

From its consultations with Aboriginal peoples across Western Australia it became apparent to the Commission that many Aboriginal people believed that amendments to laws and policies were not as meaningful without the fundamental respect for Aboriginal peoples and their laws that could be brought about by constitutional change. A participant at the Manguri consultation in metropolitan Perth put it plainly, saying that: 'Until we deal with the foundations, it is only whitewashing'.¹¹

Constitutional acknowledgment of Aboriginal peoples as 'first Australians'

Calls for constitutional recognition of Aboriginal people are not new in Australia. Most calls for constitutional change seek to redress the injustices of the past by acknowledging Aboriginal peoples as the 'original occupants and custodians of the land'¹² and by recognising that this cultural connection continues today.¹³ Constitutional change of this type has been mooted in recent years in Queensland and Victoria, as well as at the Commonwealth level.

Recognition of Aboriginal peoples in the Queensland and Commonwealth examples was subsumed into proposed constitutional preambles addressing such things as equality of citizens; government by Rule of Law; tolerance of and respect for others; and upholding freedom. The proposed preamble to the Queensland Constitution was subject to a long consultative process, with a parliamentary committee ultimately recommending against its adoption.¹⁴ The committee cited reasons such as insufficient public support; uncertainty as to whether or how the preamble should affect interpretation of the Constitution; and lack of consistency between the content of the Queensland Constitution and the aspirational elements of the proposed preamble.¹⁵ The proposed preamble to the Australian Constitution was put to national referendum on 6 November 1999, along with the question whether Australia should become a republic. The referendum was defeated on both issues. In relation to the preamble question the 'no' vote gained a 60 per cent national majority with Western Australia having the second highest 'no' vote at 65.27 per cent.¹⁶

9. Ibid.

10. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 3.

11. LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 2.

12. See for example, the proposed preamble to the Queensland Constitution: Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46 (November 2004) 1.

13. See for example, the proposed preamble to the Australian Constitution contained in the schedule to the Constitution Alteration (Preamble) Bill 1999 (Cth) and put to national referendum on 6 November 1999.

14. Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46 (November 2004) 23.

15. Ibid.

16. See the Australian Electoral Commission, <www.aec.gov.au/-content/how/newsfiles/news87.htm>.

Victoria is currently the only Australian jurisdiction that specifically acknowledges the unique status of Aboriginal people as ‘first Australians’. The section, which was inserted by the *Constitution (Recognition of Aboriginal People) Act 2004* (Vic), is worth setting out in full.

1A. Recognition of Aboriginal people

- (1) The Parliament acknowledges that events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
- (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established—
 - (a) have a unique status as the descendants of Australia's first people; and
 - (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
 - (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.
- (3) The Parliament does not intend by this section—
 - (a) to create in any person any legal right or give rise to any civil cause of action; or
 - (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.

The provision is insured against arbitrary repeal or alteration by the requirement of a special majority of three-fifths of both Houses of Parliament before any variance to the provision can be lawfully presented to the Governor for Royal Assent. The Victorian constitutional amendment was welcomed by the Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma who said:

The Victorian Government and opposition parties are to be congratulated for making Victoria the first state in Australia to recognise Indigenous people in its constitution. While legal rights are not conferred by the amendment, it is nevertheless important to Indigenous people that their unique status as the original owners of the land is recognised at the constitutional level ... The amendment to Victoria's constitution can be more than the simple recognition of an historical truth. It can provide an opportunity to learn from the past and ensure that the original custodians continue to play a significant role in contemporary society.¹⁷

Constitutional recognition of Aboriginal customary law as a distinct ‘source’ of law

The other type of constitutional change relevant to this reference is the recognition of Aboriginal customary law as a distinct ‘source’ of law in the state Constitution. Steven Churches’ background paper to this reference canvasses some of the advantages and disadvantages of ‘source of law recognition’ in the Western Australian Constitution. While the Commission does not intend to reproduce these arguments here, it is pertinent to note, as Churches does, that ‘some aspects of Aboriginal customary law are too contrary to mainstream legal culture’ and for this reason they ‘cannot be invested in the Constitution’.¹⁸ He suggests that constitutional recognition would be viable only by limitation of the recognition of customary law to matters of:

- (i) familial and social relationships;
- (ii) land management and associated intellectual property rights and conservation regimes under customary law; and
- (iii) Aboriginal community governance.¹⁹

In Churches’ opinion, the scope and applicability of customary laws relating to these matters, should further be ‘entrench[ed] in discrete legislation’.²⁰ Churches believes that any inconsistency arising between Aboriginal customary law and mainstream legal culture can be managed, but ostensibly only by subjecting customary law to some degree of codification. For the reasons expressed below under the heading ‘Codification’, the Commission believes that this is not a desirable course.

The question of constitutional recognition of Aboriginal customary law as a source of law has also been investigated by the Northern Territory's Sessional Committee on Constitutional Development as an aspect of the Northern Territory's 1990s bid to move to statehood. After a very thorough consultative process (commencing with a discussion paper in 1992 and ending with a draft constitution in 1998) the sessional committee recommended that Aboriginal customary law be recognised as a distinct source of law in the Northern Territory. The draft constitution that emerged from the Statehood Convention in 1998 and was put

17. Calma T, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Commissioner Welcomes Constitutional Recognition for Historical Truth* (Media Statement, 5 November 2004).

18. Churches S, *Aboriginal Customary Law in the Context of Western Australian Constitutional Law*, LRCWA, Project No 94, Background Paper No 14 (April 2005) 15.

19. Ibid 27.

20. Ibid 16, 27.

to the people at a referendum the same year provided that:

6.3 Customary Law

(1) Aboriginal customary law is recognised as a source of law in the State to be enacted as the written law of the State (within 5 years of the commencement date or such further period as Parliament determines) by the Parliament passing laws in substantial accordance with the results of negotiations and consultations between the State government and representatives of the traditional Aboriginal structures of law and governance of the Aboriginal peoples of the Northern Territory providing for the harmonisation of the customary law with other laws in force in the State, including the common law.

The intention of this section was that Aboriginal customary law be recognised 'as a source of Northern Territory law on a par with the common law. Both would be subject to any legislation'.²¹ However, as Ken Brown has pointed out, the section 'bestows no automatic recognition on customary law', 'it subjects the process to political control', and 'it imposes an open-ended negotiation and consultation procedure designed toward harmonisation not applicability'.²² Moreover, Brown observes that in this context 'harmonisation' must mean the process of ensuring that Aboriginal customary law conforms in every way with every other form or source of law including, presumably, the common law.²³ There is a danger that this may set up a hierarchy of sources of law which may have the unwelcome effect of demeaning customary law.²⁴

Although harmonisation of laws is a necessary and desirable outcome of the recognition process, the Commission has concerns (also expressed earlier in relation to Churches' study) with the apparent requirement that customary law be codified, or at least in some way 'discovered' and accepted by the powers that be in order to effect source of law recognition. The Commission notes that concerns about the

problems inherent in codification of Aboriginal customary laws were also shared by the ALRC and the NTLRC.²⁵ Nevertheless, the NTLRC renewed the call for source of law recognition in recommendation 11 of its recent inquiry into Aboriginal customary laws.²⁶ Unfortunately, there is nothing in the NTLRC's report to indicate how this might more effectively be realised; although it is noted that a new constitutional statehood process is currently underway and that the further consideration of constitutional recognition of Aboriginal customary law will be a part of that process.²⁷

Constitutional recognition in Western Australia – the Commission's preliminary view

The Western Australian Constitution is a typical 19th century constitutional document focusing, as George Winterton has observed, 'almost entirely on the machinery of government'.²⁸ It has no comment on the social or political values of the peoples of Western Australia or allusion to their aspirations. This, perhaps, is fitting of a constitutional document, but nonetheless is very different to national constitutions like those of the United States, South Africa, Ireland and India which each assert in their preambles the ambitions of such things as freedom, equality, liberty and justice for all peoples. The present Attorney-General, Jim McGinty, has suggested that the Western Australian Constitution is in need of a comprehensive overhaul to, amongst other things: institute electoral equality; remove obsolete and spent provisions; set out more completely the powers and responsibilities of the Governor, the Premier, Cabinet and Ministers; and insert a Bill of Rights.²⁹ McGinty envisages the introduction of a preamble 'expressly recognising and reaffirming the position of Indigenous people as occupants and inhabitants of this state prior to and after European settlement'³⁰ as part of this constitutional reform. Although plans for wider constitutional reform were put on hold in July 2004,³¹ the Minister for Indigenous

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21. *Foundations for a Common Future: The report on paragraph 1(a) of the Sessional Committee on Constitutional Development's terms of reference on a final draft Constitution for the Northern Territory* (Vol 1, 1996) [5-6] as cited in NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 10.
22. Brown K, 'Paper Promises: The constitutional prescription of customary law in the Northern Territory' (1999) 24(5) *Alternative Law Journal* 221, 223.
23. *Ibid.*
24. Such observation has earlier been made by Brown, *ibid* 232.
25. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [202], [208]; NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) [3.10]–[3.11].
26. NTLRC, *ibid* [10.1]–[10.7].
27. *Ibid* [10.2].
28. Winterton G, 'Submission No 104' cited in Legislative Assembly of Queensland, Legal Constitutional and Administrative Review Committee, *A Preamble for the Queensland Constitution?*, Report No 46 (November 2004) 4.
29. McGinty J, Attorney General of Western Australia, *Speech to the Constitution at Large Conference* (22 March 2003).
30. *Ibid* 4.
31. Electoral change has, however, been achieved by the *Constitution and Electoral Amendment Act 2005* and the *One Vote One Value Act 2005*.

Affairs announced that the government would nevertheless ‘push ahead with plans to change the WA Constitution to recognise Aboriginal people as the first inhabitants’.³² At the time of writing, no Bill to amend the Constitution for this purpose had been introduced to Parliament.

It is the Commission’s opinion that Western Australia requires a form of constitutional recognition of Aboriginal peoples which celebrates their unique status; acknowledges their prior occupation of Western Australia and their continuing connection to the land; and encourages their continuing cultural contribution to this state. The Commission calls this ‘reconciliatory recognition’. However, rather than recognition through the means of a preamble to the Western Australian Constitution, the Commission prefers the Victorian precedent of enacting the acknowledgement as a foundational provision of the Constitution.³³ This path is preferred for a number of reasons. First, the Commission is concerned that a preamble will be seen as a mere aspirational statement: an add-on rather than a genuine provision of the Constitution. Second, as the Commonwealth and Queensland examples show, constitutional preambles are likely to include references to other matters germane to the polity, such as equality, freedom and government by Rule of Law. The Commission considers that constitutional recognition of the unique status of Aboriginal peoples must be done with due respect and that, if it is to be taken as a serious reconciliatory gesture, it must be dealt with by a dedicated provision. Finally, the Commission notes that there is currently no s 1 to the Western Australian Constitution, it having been repealed in 1998.³⁴ The Commission believes that this provides a clear and immediate opportunity for constitutional acknowledgment of Aboriginal peoples by foundational provision in the manner of the Victorian amendment.

Although some may see reconciliatory recognition as a ‘weaker’ form of constitutional recognition than source of law recognition, the Commission believes that, in the context of the pragmatic and extensive proposals for the recognition of Aboriginal customary law contained in this document, this is the best path for

Western Australia. Significantly, it avoids the problems with constitutional recognition of customary law, described earlier, such as the need to ascertain the law, to codify it, to limit its scope by reference to other sources of law and, ultimately, to control it. It is this last point that will most likely offend Aboriginal culture and potentially diminish customary law. It is the Commission’s opinion that any method of recognition that involves unnecessary state interference with Aboriginal customary law should be avoided. As Brown has observed, ‘[c]ustomary law will remain significant to its adherents whether or not it receives formal endorsement in a constitution’.³⁵

In the Commission’s view, the proposals for reform that are mooted throughout this Discussion Paper achieve the intent of statutory and administrative recognition of Aboriginal customary law whilst allowing Aboriginal control over the content and application of that law to remain. Most importantly, however, the Commission understands this to be the desire of the Aboriginal peoples it consulted for this reference who relevantly observed that constitutional acknowledgment of Western Australian Indigenous *peoples*—rather than Indigenous *laws*—was a necessary foundation for effective governance.

Proposal 4

That, at the earliest opportunity, the Western Australian government introduce into Parliament a Bill to amend the Constitution to effect, in s 1, the recognition of the unique status of Aboriginal peoples as the descendants of the original inhabitants of Western Australia. The provision should also acknowledge Aboriginal peoples as the original custodians of the land, acknowledge their continuing spiritual, social, cultural and economic relationship with lands and waters in Western Australia, and acknowledge the special contribution that Aboriginal peoples have made to Western Australia.

The Commission commends the provisions of s 1A of the *Victorian Constitution Act 1975* as precedent for the drafting of a similar provision for Western Australia’s Constitution.

32. Pryer W, ‘Constitution Change to be Pushed Ahead’, *The West Australian*, 16 July 2004, 12.

33. There is currently no s 1 in the *Western Australian Constitution Act 1889*.

34. *Statutes (Repeals and Minor Amendments) Act [No. 2] 1998* (WA), No 100 of 1998.

35. Brown K, ‘Paper Promises: The constitutional prescription of customary law in the Northern Territory’ (1999) 24(5) *Alternative Law Journal* 221, 223.

The Commission considers that constitutional recognition of the unique status of Aboriginal peoples must be done with due respect and . . . must be dealt with by a dedicated provision.

Common Law or Judicial Recognition

The judicial system has been at the forefront of recognition of Aboriginal customary law in Australia. Even in the absence of legislation directing courts to take account of customary law for certain purposes, judges have employed their judicial discretion to give weight to arguments based in Aboriginal customary law.

As Victoria Williams shows in her background paper³⁶ to this reference, there are a significant number of instances in the past two decades where Aboriginal customary law has been recognised as an important factor in informing the courts of circumstances surrounding relevant cases. This judicial recognition of Aboriginal customary law has featured in a broad range of cases in different areas of law. In some cases Aboriginal customary law has been taken into account in the consideration of defences and in the mitigation of sentence for criminal offences. The courts have also taken customary law into account in: determining applications for bail; coronial and burial matters; claims of native title rights to land; alleged breaches of Indigenous cultural copyright (particularly in respect of artworks); offences against laws controlling the right to hunt, fish and gather native foods; and in determining cases regarding the custody of children.

The common law is clearly one way in which Aboriginal customary law is recognised in the Western Australian legal system and evidently many judicial officers feel obliged to consider arguments based in Aboriginal customary law in relevant cases. However, there are undoubtedly cases where Aboriginal customary law may have informed a court in its determination but where rules of evidence prohibited its introduction; where counsel failed to raise (or the court failed to consider) relevant customary law issues; or where inadequate or unreliable evidence of relevant customary laws was

introduced.³⁷ Moreover, in the absence of legislative obligation the judicial recognition of Aboriginal customary law will only ever be on an ad hoc basis. The common law therefore cannot be expected to provide a coordinated, consistent recognition of Aboriginal customary law.

In its 1986 report the ALRC concluded that 'the common law does not provide an appropriate *general* basis for the incorporation or recognition of Aboriginal customary laws'.³⁸ In view of the discussion above the Commission agrees with this conclusion. The Commission also notes the remarks of Patrick Dodson in his *Regional Report of Inquiry into Underlying Issues in Western Australia* for the RCIADIC where he said that:

[T]he failure to enshrine customary law in legislation ... has reduced Aboriginal people to reliance upon the patronage of police and judicial officers. The position of Aboriginal people in respect of the legal system remains precarious. Aboriginal people have for too long been dependent on the use of 'discretions'. In my Commission's view, they should not have to approach police and courts as supplicants for recognition of their customary law.³⁹

For these reasons, while the important role of courts and the judiciary in the recognition of Aboriginal customary law is acknowledged, it is the Commission's view that the preferred course would be for the government of Western Australia to legislate directing the courts to have regard to Aboriginal customary laws in relevant cases. The Commission appreciates that legislative direction of this nature must be in sufficiently general terms so as not to unduly restrict judicial officers in their determination of cases, particularly in respect to the exercise of judicial discretion in determining the weight to be given to such matters. However, there may be a need to enumerate certain principles to guide

36. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003).

37. Such was the case in *Munugurr v R* (1994) 4 NTLR 63 (Northern Territory Court of Appeal).

38. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [69] (emphasis in original).

39. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol 1, 1991) [5.11].

judicial officers and legal counsel in relation to the production and relevance of evidence of Aboriginal customary laws in a court and other, mostly procedural, matters. The form and content of proposed legislative provisions will be discussed in the following Parts.

Codification

Both the ALRC and the NTLRC recommended against the codification of Aboriginal customary law. The Commission shares this view for the following reasons:

- the difficulty of precisely defining what constitutes Aboriginal customary law;⁴⁰
- the varying content and practice of Aboriginal customary law in Western Australia;
- the need for flexibility in the interpretation of Aboriginal customary law, particularly in respect of its interaction with Australian law;
- the removal of Aboriginal autonomy over the content, application and interpretation of Aboriginal customary law;
- the fact that courts would become the ‘primary agencies for the application of customary law’;⁴¹ and
- the potential for distortion of customary laws that may follow from application of customary law by non-Indigenous people and agencies.⁴²

Importantly, codification of Aboriginal customary law may lead to the further disempowerment of Aboriginal people in Western Australia – a concern that is at the heart of this reference. Codification would also significantly erode the authority structures of traditional Aboriginal society by transferring power over the interpretation and application of Aboriginal customary law to courts and other government agencies. According to the Aboriginal communities that were consulted for this reference, the erosion of traditional authority and lack of respect for Elders is a problem that has already impacted upon Aboriginal communities as a consequence of non-recognition of customary law. The Commission considers that it would be irresponsible to propose a form of recognition that would ultimately exacerbate that problem.

Statutory Recognition

In its 1986 report the ALRC proposed a draft Bill for the recognition of Aboriginal customary laws in certain areas such as family law, criminal law, and hunting, fishing and gathering rights. It was the ALRC’s intention that the Commonwealth ‘cover the field’ in these areas or enter into cooperative agreements with the states to ensure that any legislation affecting the welfare of Aboriginal people have nationwide coverage (in the manner of the now defunct cross-vesting legislation). Although discussions ensued over the next decade with the Standing Committee of Attorneys-General, no cooperative agreement with the states was reached and the ALRC’s draft Bill was never introduced into federal Parliament.

The Commonwealth and some states did, however, introduce legislative amendments to recognise traditional Aboriginal marriages for particular purposes (such as adoption and compensation or as equivalent to de facto marriages) and a number of states enshrined the ALRC’s ‘child placement principle’ in legislation.⁴³ Notably, Western Australia was not among those states. Indeed, as will become clear from the discussion in the following Parts of this paper, there are very few existing instances of statutory recognition of Aboriginal customary laws in Western Australia.

Whilst the Commission does not seek to remedy this by introducing the concept of codification of Aboriginal customary laws—an outcome that is neither possible nor desirable for the reasons referred to above—it does acknowledge the potential of legislation to effect practical recognition of Aboriginal customary law in the Western Australian legal system. Therefore, certain of the Commission’s proposals in the following Parts, refer to the need for statutory change in Western Australia.

Administrative Recognition

There are numerous state government agencies that make daily decisions affecting the lives of Aboriginal people in Western Australia. As will be clear from Part II, many of these agencies have policies and programs in place for the better delivery of services to their Indigenous clients. Whilst these policies and programs

40. Particularly because Aboriginal customary law is unwritten and, in many instances, guarded by secrecy.

41. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [202].

42. See *ibid* 147–48; NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 11.

43. See *Community Welfare Act 1983* (NT); *Children (Care and Protection) Act 1987* (NSW); *Adoption of Children Act 1988* (SA); *Children (Guardianship and Custody) Act 1984* (Vic); *Adoption of Children Act 1964* (Qld).

Codification would significantly erode the authority structures of traditional Aboriginal society by transferring power over the interpretation and application of Aboriginal customary law to courts and other government agencies.

consider the statistical measures of Indigenous disadvantage relevant to particular agencies, they often fail to consider the impact of customary law upon their Indigenous client base. As can be seen from examples in Part II above, customary law can significantly inform agencies in the enhancement of their programs and policies for the betterment of Indigenous people in this state.

As Toohey has noted in his background paper for this reference, recognition of Aboriginal customary law by administrative means affords a flexibility to adapt to changing circumstances – something that is rarely achievable by statutory recognition.⁴⁴ Nonetheless, as the ALRC has noted, there are some disadvantages to non-statutory methods of recognition, particularly those that rely upon administrative discretions:

Administrative discretions may be applied in a spasmodic or inconsistent way. Not all law-enforcement officials are equally aware of or sympathetic to the needs of Aboriginal people. Aborigines involved in such situations are, in the absence of clear guidelines, much less able to challenge adverse decisions: they have no right to recognition.⁴⁵

The need for formalised recognition in these circumstances is a point also acknowledged by Toohey.⁴⁶ Without some posited, if not binding, direction regarding the consideration of Aboriginal customary law in relevant circumstances, its recognition is meaningless. Although, in the passage above, the ALRC refers only to 'law-enforcement officials' the observation applies equally to any government officials, including, for instance, those that make decisions about the allocation of public housing or the delivery of health services.

Toohey also observes in his background paper that very often the complaints made about the legal system by Indigenous people are directed to the administration of that system rather than to the content or substance

of laws.⁴⁷ This observation was borne out by the Commission's consultations with Aboriginal communities across Western Australia in which the procedures and practices of prison authorities, the police service, courts, health services and other agencies were criticised for failure to recognise customary laws and cultural practices of Indigenous clients. In some instances, this failure can result in significant injustice for the Aboriginal people involved.

It is within the administrative realm that the Commission believes the appropriate recognition of Aboriginal customary law will most likely be seen to make a real difference to the daily lives of Indigenous people in Western Australia. Administrative recognition could take the form of simple changes to procedures to accord proper respect to customary laws on a regional basis (such as that outlined in respect of delivery of health services in Part II above). However, to overcome the



44. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 16.

45. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [207].

46. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 16.

47. Ibid 17. An observation also earlier made by the ALRC: ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [209].

disadvantages mentioned by the ALRC, the success of this form of non-statutory recognition would depend upon the proper monitoring of behavioural and real outcomes in service delivery and ongoing accountability. Another, more binding, form of non-statutory recognition involves the establishment of formal guiding principles to which administrative decision-makers must have regard in making decisions or exercising discretions that affect Indigenous clients. But in order to achieve meaningful recognition, such guidelines must be accessible to the public and their processes of application must be transparent. For this reason the Commission has preferred statutory recognition where circumstances permit and there is no threat of codification of customary law (particularly in relation to the creation of rights or expectations).⁴⁸

The Commission's View

It is the Commission's view that the continuing existence and practice of Aboriginal customary laws in Western Australia should be recognised. However, such recognition must work within the existing framework of the Western Australian legal system. For reasons expressed above, the Commission opposes the codification of Aboriginal customary law, although it supports the legislative recognition of Aboriginal customary law in certain circumstances.⁴⁹

Although the Commission's proposals cover a much broader area than those of the ALRC, the Commission supports the ALRC's approach of 'functional recognition'; that is, recognition of Aboriginal customary law for particular purposes in defined areas of law. This approach allows for a variety of methods of recognition resulting in proposals for recognition that fall broadly into two categories: affirmative and reconciliatory.

In the affirmative category, the objectives of the Commission's proposals are the empowerment of Aboriginal people, the reduction of Indigenous disadvantage, and the resolution of problems and injustice caused by the non-recognition of Aboriginal customary law in the Western Australian legal system. This would be achieved by such changes as the

introduction of statutory provisions and guidelines requiring courts and government agencies to take account of Aboriginal customary law in the exercise of their discretions where circumstances require; the adoption of a whole-of-government approach to service delivery for Indigenous Western Australians; the introduction of models of self-governance for Aboriginal communities; the functional recognition of traditional Aboriginal marriage; and the empowerment of Aboriginal Elders and other respected community members to play an active role in the administration of justice.

In the reconciliatory category, the objectives of the Commission's proposals are the promotion of reconciliation between Indigenous and non-Indigenous Western Australians and of pride in Aboriginal cultural heritage and identity. This would primarily be encouraged by the amendment of the state Constitution in the manner described above under the heading 'Constitutional Recognition'.⁵⁰ The Commission considers constitutional change to be vital in the achievement of meaningful recognition of Aboriginal customary law and culture – a belief supported by the many Aboriginal respondents consulted for this reference.

Addressing a forum at Parliament House, Canberra in 1995, Lowitja O'Donoghue said:

[T]he long standing absence of meaningful recognition of Aboriginal customary law has had a detrimental effect on all facets of Aboriginal community development and ... has substantially contributed to many of the social problems and varying degrees of lawlessness present today ... The failure of successive governments to recognise customary law has resulted in the erosion of Aboriginal cultures.⁵¹

The proposals for affirmative and reconciliatory recognition of Aboriginal law and culture contained in this Discussion Paper are more than simply symbolic gestures. These proposals are the first step towards the institution of meaningful recognition of Aboriginal law and culture in Western Australia and, it is hoped, towards a more harmonious and respectful relationship between its Indigenous and non-Indigenous peoples.

48. The Commission notes the comment of the former president of the ALRC that 'too much reliance has been so far placed on the existence of administrative arrangements as a method of recognition' and that such arrangements should be careful not to reflect a pre-*Mabo* philosophy or social welfare approach. Rose A, 'Recognition of Indigenous Customary Law: The way ahead' (Paper presented at the Forum on Indigenous Customary Law, Canberra, 18 October 1995) 9.

49. To be discussed in the Parts following.

50. However, other reconciliatory proposals, such as the introduction of protocols to protect Indigenous cultural and intellectual property, are also made in this Discussion Paper.

51. O'Donoghue L, 'Customary Law as a Vehicle for Community Development' (Paper presented to the Forum on Indigenous Customary Law, Canberra, 18 October 1995) 3, as cited in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 1.

PART IV

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Aboriginal Customary Law in the International Context

In framing its proposals for recognition of Aboriginal customary law the Commission is required by its Terms of Reference to have regard to relevant Commonwealth legislation and to Australia's international obligations. The Commission published three background papers on Aboriginal customary law in the international arena by experts in the area. Each of these papers focused on a different topic namely, Aboriginal customary law in the context of international human rights law;¹ conceptual issues in recognition of customary law at the international level;² and international developments in benchmarking to reduce Indigenous disadvantage.³ It is not the intention of the Commission to reproduce these papers here; however, the topics covered in these background papers do merit some discussion in order to place the recognition of Aboriginal customary law in Western Australia in its international context, in particular the human rights context.

International Law and Australia's International Human Rights Obligations

International law can be understood as a body of rules that governs relationships between nations. These rules cover such matters as the conduct of nations during war; the control of nuclear and chemical weapons; the regulation of international waters beyond state boundaries; the regulation of environmentally harmful practices, such as whaling; the conduct of trade between nations; and, importantly, the protection of human rights. Rules binding at international law can take the form of treaties, conventions, protocols,⁴ covenants or an exchange of letters: each of these is a form of agreement (whether bilateral or multilateral) between nation states.

International Law: The Human Rights Focus

The United Nations General Assembly and its charter-based agencies or commissions are responsible for negotiating treaties between member states and setting international standards. In the human rights field the primary standard-setting agency is the United Nations Commission on Human Rights, an organ of the United Nations Economic and Social Council which is responsible for the promotion and protection of human rights. The International Labour Organisation (ILO), which was established by the Treaty of Versailles in 1919, also negotiates treaties that have human rights elements, although these are generally confined to labour matters such as working conditions and protection from child labour. Other relevant agencies are the Sub-Commission on the Prevention of Discrimination and Protection of Minorities and, of particular relevance to the current reference, the



1. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 10 (March 2005).
2. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some conceptual issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005).
3. Marks G, *The Value of a Benchmarking Framework to the Reduction of Indigenous Disadvantage in the Law and Justice Area*, LRCWA, Project No 94, Background Paper No 3 (June 2004).
4. Protocols are usually used to extend or amend treaties or conventions, such as the First Optional Protocol to the *International Covenant on Political and Civil Rights* (ICCPR) which sets up the complaints mechanism to the United Nations Human Rights Committee for violation of the ICCPR. A party to a treaty is not obliged to become a party to a protocol.

United Nations Working Group on Indigenous Populations.

Perhaps the best known international law treaties are those that make up what is known as the 'International Bill of Rights': the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).⁵ The ICCPR and ICESCR were preceded by the *Universal Declaration of Human Rights* (UDHR) in 1948, itself a response to the atrocious breaches of human rights during World War II. Although the UDHR is not officially legally binding (remaining, as it does, at the status of a non-binding 'declaration'), its precepts have become generally accepted as rules of 'customary international law';⁶ that is, rules that are 'accepted as binding by a majority of civilised nations'.⁷ These documents form the core of the international human rights norms established by the United Nations; however, there are many other conventions that set standards for human rights generally and for the rights of vulnerable groups. These include the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), the *Convention on the Rights of the Child* (CROC), the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), and the *International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (ICAT). Each of these treaties sets up a body to oversee the obligations of state parties under the treaties and, in relation to ICERD, ICCPR, ICAT and CEDAW, to hear individual complaints against treaty violations.

Australia's International Human Rights Obligations

Although Australia has ratified almost 900 international treaties⁸ and is considered bound by the terms of these treaties at international law, it does not necessarily mean that Australian governments must observe them at home. This is because a ratified treaty does not have



any binding legal effect in Australian law until it is incorporated by legislation passed by both houses of federal Parliament. Whilst a proper and perhaps necessary restriction on the executive treaty-making power, this rule has meant that Australians are not automatically protected by the human rights norms contained in international conventions.

Fortunately, the primary human rights instruments, such as the ICCPR, ICERD and some provisions of the ICESCR have been incorporated into Australian laws such as the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Disability Discrimination Act 1992* (Cth). These laws are overseen by the Human Rights and Equal Opportunity Commission (HREOC) which investigates and attempts to conciliate human rights complaints.⁹ Australians also have the right to make complaints of violations of the ICCPR to the United Nations Human Rights Committee (or of violations of ICERD to the Committee on the Elimination of All Forms of Discrimination) once all remedies have been exhausted in the Australian legal system.¹⁰ However, the effectiveness of these international complaints mechanisms is questionable. Megan Davis and Hannah McGlade report that although Australia was placed on a CERD human rights watch list following such a complaint for 'its failure to meaningfully consult with Aboriginal people' in respect of amendments to the *Native Title Act 1993* (Cth), this had no substantive effect on the government's ultimate actions.¹¹ In fact

5. The ICCPR and the ICESCR were established in 1966 and Australia became bound to these conventions in 1980 and 1976 respectively.

6. To become a rule of customary international law to which a state is bound, the rule must be consistently practised by the state and the state must have accepted its obligation to adhere to such rule.

7. O'Neill N & Handley R, *Retreat From Injustice* (Sydney: Federation Press, 1994) 13.

8. *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (McHugh J).

9. The Western Australian government is bound to a certain extent by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) but also has its own commission and tribunal established under the *Equal Opportunity Act 1984* (WA).

10. See Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 23.

11. *Ibid* 23–24.

the Australian government is reported as having rejected the Committee's criticisms as 'unbalanced' and 'intruding unreasonably into Australia's domestic affairs'.¹²

The status of Australia's international obligations under human rights treaties that have not been incorporated into Australian law is currently ambiguous. Australia is required at specified intervals to report to the relevant treaty body on the domestic measures adopted to give force to the conventions it has ratified but this may have very little effect on some of the day-to-day administrative decisions made by governments. In 1995 a case came before the High Court concerning the domestic application of CROC, an international convention ratified by Australia. A majority of the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*¹³ found that the fact that a ratified treaty is not incorporated does not mean that it is without significance in Australian law. The Court held that the terms of a ratified treaty can provide assistance in statutory interpretation; can provide a source for the development of the common law; and, if there is no expressed parliamentary or executive intention to the contrary, can create a legitimate expectation at administrative law that a government decision-maker will exercise any statutory discretion consistently with Australia's relevant treaty obligations.¹⁴ Although successive federal governments have been unsuccessful in passing legislation to overcome this decision,¹⁵ there have been executive declarations by numerous governments, including the Western Australian government, circumscribing the effect of international instruments upon administrative decision-making.¹⁶ The High Court's recent decision in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*,¹⁷ while not going so far as to overturn *Teoh*, indicates that ratification might not now be enough to create a legitimate expectation. Essentially this means that unincorporated treaties ratified by Australia may provide

assistance to courts in interpreting the law but will not create rights or expectations within the Australian legal system.

International Law and Indigenous Peoples

Current International Protection of Rights of Indigenous Peoples

ICCPR

The rights of indigenous peoples or ethnic minorities are recognised in a number of international instruments that have been ratified by Australia. Principal among these is the ICCPR which contains, in Article 1, a right to self-determination¹⁸ and in Article 27, a collective right to enjoyment of culture, religion and language. Although the applicability of Article 1 to Indigenous peoples is the subject of debate,¹⁹ the rights provided to ethnic minorities by Article 27 have been successfully relied upon by indigenous peoples in cases before the United Nations Human Rights Committee.²⁰ Nonetheless, the Committee (which oversees state party compliance with the ICCPR) has made clear that the rights protected by Article 27 are not absolute and cannot be exercised in a manner that is inconsistent with other provisions of the ICCPR.²¹ The potential of conflict between indigenous cultural practices and international law will be examined in more detail below.

ILO Convention 169

Another important international convention protecting the rights of indigenous peoples is ILO Convention 169. The Convention confirms rights to autonomous economic and social development of indigenous peoples²² and places positive obligations on signatories to have regard to customary laws in the application of

12. ATSI, 'Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the United Nations Convention on the Elimination of all Forms of Racial Discrimination' (2000) <http://www.atsic.gov.au/issues/Indigenous_Rights/International/CERD/Default.asp>.

13. (1995) 183 CLR 273.

14. Ibid.

15. The Administrative Decisions (Effect of International Instruments) Bill 1995 (Cth) was introduced by the Keating Labor government but lapsed when Parliament was dissolved for the 1995 general election. The succeeding Howard Coalition government introduced its own legislation to Parliament in 1997 but the Labor opposition withdrew its support in the Senate leaving the issue unresolved by the time of the 1998 election. A second attempt by the re-elected Coalition government in 1999 also lapsed for the same reason. See Cranwell G, 'Treaties and Australian Law – Administrative Discretions, Statutes and the Common Law' [2001] *Queensland University of Technology Law and Justice Journal* 5.

16. See Lacey W, 'In the Wake of *Teoh*: Finding an Appropriate Government Response' (2001) 29(2) *Federal Law Review* 219.

17. (2003) 195 ALR 502. See, in particular, the joint judgment of McHugh and Gummow JJ and the judgments of Hayne and Callinan JJ.

18. The same provision appears in Article 1 of the ICESCR and in the *United Nations Charter 1945*. Issues relating to Indigenous self-determination in Western Australia are discussed in greater detail in Part X 'Aboriginal Community Governance in Western Australia', below pp 419–38.

19. See Eide A & Daes E, *Working Paper on the Relationship and Distinction Between the Rights of Persons Belonging to Minorities and those of Indigenous Peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, [21].

20. See the discussion of cases by Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 55–56.

21. United Nations Commission on Human Rights, *The Rights of Minorities*, 50th session (1994) CCPR General Comment No 23.

22. International Labour Organisation, *Convention Concerning Indigenous and Tribal Persons in Independent Countries*, ILO Convention 169, Article 7.

national laws and regulations upon Indigenous peoples.²³ Although not ratified by Australia, ILO Convention 169 has been employed by the Australian judiciary in the interpretation of statutes.²⁴ And, as Chris Cunneen and Melanie Schwartz report in their background paper to this reference, the Convention is also used as a framework for international funding agencies in regard to the establishment of policies and programs for the benefit of indigenous peoples.²⁵ These applications of the Convention by non-state parties have led some commentators to suggest that, like the UDHR, the Convention is becoming accepted as binding international customary law.²⁶

ICERD

ICERD deals specifically with non-discrimination in the context of race and has therefore become an important weapon in the human rights armoury of indigenous peoples. In particular, it sets benchmarks of internationally agreed minimum standards which Aboriginal people have used to measure Australia's performance in respect of its international obligations.²⁷ In 1997, the ICERD treaty body (the Committee on the Elimination of Racial Discrimination) adopted a General Recommendation pertaining specifically to Indigenous peoples which called upon state parties, including Australia, to:

- (a) recognise and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular based on Indigenous origin or identity;
- (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in

public life, and that no decisions directly relating to their rights and interests are taken without their informed consent; and

- (e) ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and to practice their languages.²⁸

This recommendation supports the protection of cultural rights of indigenous peoples under Article 27 of the ICCPR and indigenous peoples' claims to a greater range of rights under the *Draft Declaration on the Rights of Indigenous Peoples*.

Working Toward an International Declaration on the Rights of Indigenous Peoples

Since the early 1970s, the rights of indigenous peoples have been a priority of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities. In 1986 the Sub-Commission released a comprehensive report into human rights and discrimination issues affecting Indigenous populations worldwide.²⁹ This report, known as 'the Cobo Report', found that racial discrimination was a common experience amongst all indigenous people and that this discrimination affected indigenous peoples in areas beyond fundamental human rights including housing, education, employment and health. The Cobo Report recommended national and international measures to eliminate such discrimination.³⁰

In response to the preliminary findings of the Cobo Report, in 1982 the Sub-Commission set up a five-member Working Group on Indigenous Populations (WGIP) to:

- review national developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous peoples; and

23. Ibid, Article 8.

24. See *Police v Abdulla* (1999) 106 A Crim R 466, 472 (Perry J).

25. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 19.

26. Anaya J, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996), as cited in ibid 19.

27. For example, as mentioned above, Australian Aboriginal peoples brought international attention, via the Committee on the Elimination of Racial Discrimination complaints mechanism, to Australia's breach of ICERD in relation to its failure to meaningfully consult Aboriginal people on amendments to the *Native Title Act 1993* (Cth).

28. Committee on Elimination of Racial Discrimination, *General Recommendation XXIII on the rights of indigenous peoples*, UN Doc A/52/18 annex V (18 August 1997).

29. United Nations, *The Problem of Discrimination Against Indigenous Populations*, E/CN.4/Sub2/1986/7. For a fuller discussion of this study undertaken over a decade by Jose R Martinez Cobo see: Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 42ff.

30. Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1), *The Rights of Indigenous Peoples* (July 1997) <<http://www.ohchr.org/english/about/publications/docs/fs9.htm>>.

- develop international standards concerning the rights of indigenous peoples, taking account of both the similarities and the differences in their situations and aspirations throughout the world.³¹

The WGIP has concentrated the bulk of its efforts on the second of these two mandates and in 1985 began work on the content of a *Draft Declaration on the Rights of Indigenous Peoples*. The Draft Declaration was adopted by the Sub-Commission in 1995 and submitted to the Commission on Human Rights for consideration. Since that time another working group has been set up to review the text and oversee the Draft Declaration's passage through the United Nations system. Currently, the Draft Declaration addresses matters such as the preservation of culture and language; the practice and development of spiritual traditions, customs and ceremonies;³² the maintenance of economic structures; the ownership, possession or use of traditional lands and resources;³³ protection against genocide and ethnocide;³⁴ the principle of self-determination through self-government; and rights of participation in dominant political structures. It also provides for minimum standards for the survival and wellbeing of Indigenous peoples.³⁵

The United Nations' intention was to have the Draft Declaration before the General Assembly to celebrate the First International Decade of the World's Indigenous Peoples (1995–2004). Although this ultimately did not come to fruition, it has been observed that the Draft Declaration has nonetheless been of enormous normative significance to the world's indigenous peoples and it is consistently cited in support of Indigenous claims in the international arena.³⁶ Importantly, the Draft Declaration was the subject of rigorous consultation with indigenous peoples and therefore addresses the charges of cultural relativism that have been made against existing so-called 'universal' human rights derived

from Western liberal tradition.³⁷ It is expected that the Draft Declaration will be introduced for ratification by state parties during the Second International Decade of the World's Indigenous Peoples which began on 1 January 2005.

United Nations Special Indigenous Mechanisms

In response to growing international concern during the past two decades about the marginalisation of indigenous peoples, the United Nations has established several mechanisms dedicated to indigenous issues. In addition to the WGIP and the Commission on Human Rights' working group on the Draft Declaration (discussed above), there are other notable mechanisms that contribute to the consideration of indigenous issues within the United Nations. One of these is the United Nations Permanent Forum on Indigenous Issues. Established in 2000, the Forum has a broad mandate to examine issues relating to indigenous peoples' economic and social development, the protection of Indigenous culture and environment, and matters such as Indigenous peoples' health, education and human rights. It also provides expert advice to the United Nations Economic and Social Council and promotes 'the integration and coordination of activities on indigenous issues within the United Nations system'.³⁸

An important focus on indigenous matters within the United Nations is also provided by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. The Special Rapporteur, established in 2001, complements the work of the WGIP and the Permanent Forum by providing thematic research on such matters as the impact of development projects on indigenous human rights and freedoms, analysis of indigenous-specific

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31. See Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1), *The Rights of Indigenous Peoples* (July 1997) <<http://www.ohchr.org/english/about/publications/docs/fs9.htm>>.
 32. As noted by Chris Cunneen and Melanie Schwartz in their background paper to this reference, the recognition of the right to develop traditions and customs is significant because it acknowledges that such customs do not remain static. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 21.
 33. Article 10 of the Draft Declaration provides for the fair compensation of Indigenous peoples who are deprived of their lands.
 34. The term 'ethnocide' pertains to the destruction of culture and would include policies of assimilation or integration imposed by a dominant power.
 35. See Office of the United Nations High Commissioner for Human Rights, Fact Sheet No. 9 (Rev 1), *The Rights of Indigenous Peoples* (July 1997) <<http://www.ohchr.org/english/about/publications/docs/fs9.htm>>. See also the more detailed discussion of the separate articles of the Draft Declaration in Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 20–25.
 36. See Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 45. An excellent summary of the work of the WGIP and its significance in respect of mobilising the international movement of the world's Indigenous peoples may be found in the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2002) ch 6.
 37. The debate about the universality of human rights provided by the primary international instruments is covered in some detail in Davis & McGlade's background paper to this reference: see *ibid* 25–28.
 38. *Ibid* 45.

legislation of states, participation of indigenous peoples in decision-making processes, and governance and investigation of old and new forms of racial discrimination. The Special Rapporteur also visits countries and communicates with governments concerning allegations of violations of human rights and fundamental freedoms of indigenous peoples worldwide.³⁹

Conflict Between Existing International Human Rights Standards and the Recognition of Aboriginal Customary Law

Recognition of Customary Law and the Principle of Equality

Perhaps the most pervasive principle of international human rights law is that of equality before the law. This principle is enumerated in the UDHR⁴⁰ and the ICCPR⁴¹ but can also be found—in the guise of non-discrimination—in ICERD⁴² and CEDAW.⁴³ Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

According to Davis and McGlade, ‘the most significant challenge to recognition of Aboriginal law is that recognition would violate the principle of non-discrimination and equality before the law’.⁴⁴ For example, recognition of Aboriginal customary law in the Western Australian context might mean that Aboriginal people are entitled to hunt game or fish in

circumstances whereas non-Aboriginal people may be prohibited or must otherwise apply for a licence. It might also allow for a broader range of kin to be entitled to a deceased estate where otherwise an estate might escheat to the Crown. And in certain circumstances recognition of Aboriginal customary law might mean that Aboriginal persons may be able to adduce evidence in mitigation of sentence for an offence that might not be available to a non-Aboriginal person. Each of these examples of recognition of Aboriginal customary law would appear to place Aboriginal people at an advantage over non-Aboriginal people. How then, can recognition that discriminates in favour of Aboriginal people be reconciled with the principle of equality at international law?

The International Court of Justice has held that the principle of equality before the law does not mean that everyone must be treated equally without regard to individual circumstances.⁴⁵ There are some cases where concrete conditions of inequality require state parties to take affirmative action and discriminate in favour of a minority in order to assist the achievement of substantive equality.⁴⁶ In Australia, unequal treatment on the basis of race is permitted under s 8 of the *Racial Discrimination Act 1975* (Cth) where special measures are required to address substantive inequality. In relation to Aboriginal people this provision has supported special legislative measures allowing unfettered access to tribal lands⁴⁷ and restrictions on the consumption and serving of alcohol.⁴⁸ Although in the first example the right of access was denied to non-Aboriginal (specifically non-Pitjantjatjara) people and in the second example the right to unrestricted consumption of alcohol was denied to Aboriginal people, it was nonetheless considered that each of these special measures was taken to benefit an Aboriginal minority by securing ‘advancement of the beneficiaries so that they may enjoy and exercise equally with others their human rights and fundamental freedoms’.⁴⁹

39. Office of the United Nations High Commissioner for Human Rights, *Information Note on the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples* (February 2005), <<http://www.ohchr.org/english/issues/indigenous/rapporteur/>>.

40. Article 7.

41. Article 26.

42. Article 1(1) as reflected domestically in the *Racial Discrimination Act 1975* (Cth) s 10.

43. Articles 1 & 2.

44. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 56.

45. *South West Africa Cases (Second Phase)* [1966] ICJ Rep 305 (Tanaka J), as cited in *ibid* 58.

46. Davis & McGlade, *ibid* 58–59.

47. *Pitjantjatjara Land Rights Act 1981* (SA), as determined by the High Court in *Gerhardy v Brown* (1985) 159 CLR 70.

48. *Liquor Act 1978* (NT) s 122.

49. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (14 May 2003), as cited in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 60.

The Commission can see no impediment in international or Commonwealth anti-discrimination laws to the specific legislative recognition of Aboriginal customary laws.

However, under Article 1(4) of ICERD (and s 8 of the *Racial Discrimination Act*) special measures are only temporary and the differentiation of rights cannot be maintained once the objectives of substantive equality are achieved. This represents a problem for recognition of Aboriginal customary law under this provision because Aboriginal customary law is essentially permanent, though like all legal systems it is evolving. Davis and McGlade suggest that a better means of recognition would be to recognise Aboriginal peoples as 'distinct peoples entitled to differential treatment rather than temporary special measures'.⁵⁰ As one commentator has said:

Recognition of customary law as an original part of the Australian legal system is not equivalent to being sensitive to or making allowances in the Australian legal process for the cultural differences of the various ethnic groups now making up multicultural Australia. In the post-*Mabo* era it is important to understand

that legislative and community recognition of customary laws is because those laws are the laws of Aborigines and Torres Strait Islanders as the first people of this country.⁵¹

The Commission's proposal for constitutional recognition of the unique status of Aboriginal peoples as 'first Australians'⁵² might be understood to support the differential treatment of Aboriginal peoples in Western Australia and the Commission can see no impediment in international or Commonwealth anti-discrimination laws to the specific legislative recognition of Aboriginal customary laws and culture in this state. Already the Western Australian government, through the Equal Opportunity Commission, has committed to entrenching a policy framework for substantive equality across all government agencies. The policy takes into account the effects of past discrimination against Indigenous peoples (and ethnic minorities), recognises that rights, entitlements, opportunities and access are

not equally distributed throughout society and acknowledges that the equal application of rules to unequal groups can have unequal results.⁵³ It is the Commission's opinion that the government's substantive equality agenda (which is focused on policy and planning, service delivery, and employment and training) can only be enhanced by the proposals for recognition of Aboriginal customary laws advanced by this Discussion Paper.



50. That is, to legitimise the differentiation of treatment under ss 9 or 10 of the *Racial Discrimination Act 1975* (Cth): Davis & McGlade, *ibid* 62. See also the comments of former Aboriginal and Torres Strait Islander Social Justice Commissioner, Bill Jonas in 'Discrimination Against Indigenous Peoples in the Justice System' (Paper delivered to the Expert Seminar on Indigenous Peoples and the Administration of Justice, Madrid, 12–14 November 2003) 4.

51. Rose A, 'Recognition of Indigenous Customary Law: The way ahead' (Speech delivered at the Forum on Indigenous Customary Law, Canberra, 18 October 1995), as cited in Davis & McGlade, *ibid*.

52. See Part III 'Constitutional Recognition', above pp 57–61.

53. Equal Opportunity Commission (WA), Substantive Equality Unit, *The Public Sector Anti-Racism and Equality Program* (undated) 7.

Aboriginal Customary Law Practices and International Human Rights Standards

A concern that is frequently voiced in relation to the recognition of Aboriginal customary law is that certain customary practices of Indigenous Australians violate the human rights considered fundamental by the international community and protected by international law. Typical examples given in support of this concern are the practices of spearing (often referred to as 'payback') and non-consensual child marriage. For instance, it has been suggested that spearing and other ritual forms of corporal punishment under Aboriginal customary law may contravene prohibitions against torture or cruel, inhuman and degrading treatment or punishment under Article 7 of the ICCPR and the provisions of ICAT. However, in its submission to the NTLRC's 2003 inquiry into Aboriginal customary law, HREOC noted that such tribal punishments will not always meet the exacting standard of intention to inflict cruelty and humiliation required by ICAT.⁵⁴ The NTLRC have also observed that the question of what is cruel, inhuman or degrading treatment or punishment is determined solely by cultural perspectives and that their discussions with Aboriginal people suggested that ritual punishments were not viewed in this manner.⁵⁵ But whilst spearing might not, in all circumstances, offend international law it does offend Western Australian law. In particular it may render the person administering the tribal punishment liable to prosecution for assault or wounding.⁵⁶

In contrast, the practice of non-consensual child marriage clearly contravenes international law, which requires the free and full consent of parties to a marriage and denies legal effect to child betrothal.⁵⁷ Although there is clear evidence that this practice is declining amongst Aboriginal peoples in Western Australia, recent Northern Territory cases have shown that promised marriages between young girls and older men are still a reality in Australian Aboriginal society and that there will inevitably be cases of conflict with

Australian law and international standards. In particular the imbalance of power relations between the parties to a promised marriage can cause infringement of rights of a vulnerable girl child to be free from violence and non-consensual sexual relations. According to HREOC, Australia's obligations at international law require governments to take active measures to prevent non-consensual traditional marriage and non-consensual sexual relations within all marriages.⁵⁸

Each of these areas of conflict is examined in detail in the relevant Parts below;⁵⁹ however, it is important to keep these aspects of Aboriginal customary law in perspective. As this Discussion Paper shows, Aboriginal customary law is much wider and its application more complex and internally regulated than these practices might suggest. Among the topics discussed in this paper are Aboriginal customary laws relating to kinship obligations (including in tort and contractual arrangements), distribution of intestate estates, harvesting of natural food resources, intellectual property, family law issues, dispute resolution and community governance. Many of these areas do not feature practices that conflict with international human rights standards and, in fact, the law in these areas may be improved by reference to the rights of Indigenous peoples under international law.

Rights of Women and Rights of Indigenous Peoples at International Law

As mentioned earlier, the rights of indigenous peoples to freely practise their culture is protected by Article 27 of the ICCPR, which reads:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Under this provision, and the provisions of the *Draft Declaration on the Rights of Indigenous Peoples*,

54. Human Rights and Equal Opportunity Commission, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (14 May 2003) 18.

55. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34.

56. For further discussion of the interaction between Aboriginal customary law and the criminal justice system, see Part V below.

57. See, for example, the *International Covenant on Civil and Political Rights* (Art 23(3)); the *International Covenant on Economic, Social and Cultural Rights* (Art 10(1)); and the *Convention on the Elimination of All Forms of Discrimination Against Women* (Art 16(2)); *Universal Declaration of Human Rights* (Art 16(2)).

58. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 21.

59. Discussion of the practice of payback and issues of recognition of spearing and child marriage (including sexual relations with a child-bride) are dealt with in Parts V and VII respectively.

governments are encouraged to protect and recognise the practice of Aboriginal customary laws. However, it has been noted (both in Australia and in other countries with indigenous populations) that the recognition of certain cultural practices may conflict with women's individual human rights which are also protected under international instruments, including the ICCPR.⁶⁰ Failure to consider apparent conflicts between collective rights of minorities and the individual rights of members of those minorities may lead to entrenched discrimination and significantly undermine the benefits of customary law recognition.

Of course, as noted earlier, the Human Rights Committee has warned that recognition of cultural rights of minorities pursuant to Article 27 must not infringe other rights protected by the ICCPR.⁶¹ In the context of Aboriginal customary law, Davis and McGlade point out that this includes the right to equality between men and women (Article 3); the inherent right to life (Article 6); the right to be free from torture or cruel, inhuman or degrading treatment (Article 7); and the right to free and informed consent for marriage (Article 23).⁶²

Article 3 of the ICCPR—the right to equality between men and women—has been upheld by the Human Rights Committee to protect against violations of women's rights by traditional cultural practices and states have been urged to ensure that 'traditional, historical, religious or cultural attitudes are not used to justify violations of women's right to equality before the law and to equal enjoyment of all Covenant rights'.⁶³ It is therefore understood that the recognition of Aboriginal customary laws as part of the right to enjoyment of culture under the ICCPR must be subjected to a careful balancing act with other fundamental human rights, particularly the rights of Aboriginal women and children. The test established by the Human Rights Committee to determine

whether a minority right under Article 27 should prevail over a more general individual human right is:

Whether the restriction upon the right of the member of a minority could be shown to have a reasonable and objective justification and be necessary for the continued viability and welfare of the minority as a whole.⁶⁴

As will become clear in Part VII of this Discussion Paper, the individual human rights of Aboriginal women and children have been uppermost in the Commission's mind in relation to the recognition of customary laws and cultural practices that impact upon family life. In this the Commission is supported by HREOC who have asserted that women's individual human rights must prevail where there is irreconcilable conflict with Aboriginal customary law.⁶⁵ However, in the absence of a decision on Aboriginal customary laws by the Human Rights Committee and in recognition of the diversity of Aboriginal peoples and cultural practices in Australia, the question whether irreconcilable conflict exists must be made on a case-by-case basis.⁶⁶

Do Conflicts Between Aboriginal Customary Law and International Human Rights Law Create a Barrier to Recognition?

As the preceding discussion reveals, there are three main areas of potential conflict between Aboriginal customary law and international human rights law that could present a barrier to recognition of Aboriginal customary law in Western Australia. The first is that specific recognition of the laws of a section of society would violate the principle of equality before the law. However, as was seen above, there are peculiar reasons why Aboriginal peoples should be seen as a special case. Firstly, as the original inhabitants of Australia, Aboriginal people cannot simply be seen as one of many ethnic

60. See, for example, Office of the United Nations High Commissioner for Human Rights, 'Harmful Traditional Practices Affecting the Health of Women and Children', Fact Sheet No 23 (1995). One such harmful practice is that of female genital mutilation which was the subject of a major United Nations education campaign during the 1990s. Other identified practices worldwide are foot-binding, early marriage, dowry deaths and female infanticide driven by cultural preference for male children.

61. Article 5 of the ICCPR declares that 'Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognised herein or at their limitations to a greater extent than is provided for in the present Covenant'.

62. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 53.

63. United Nations Human Rights Commission, *Equality of Rights Between Men and Women*, CCPR/C/21/Review.1/Add.10, CCPR General Comment No 28 (29 March 2000) [5], as cited in *ibid* 53–54.

64. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34. This test was used in *Lovelace v Canada* (HRC 24/77) and *Kitok v Sweden* (HRC 197/85).

65. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 6.

66. *Ibid* 5.

International human rights standards . . . provide important benchmarks against which the protection and promotion of the rights of Aboriginal people . . . can be measured.

minorities; and secondly, the concrete conditions of inequality experienced by Aboriginal people (described in Part II) suggest the need for affirmative discrimination. In addition, it must be acknowledged that the cultural rights of indigenous peoples are also protected by the ICCPR.

The other two potential conflicts involve the recognition of particular Aboriginal customary practices that may contravene international laws. The discussion in relation to each of these areas highlights the fact that although recognition of Aboriginal customary law may be considered desirable as part of a program of affirmative discrimination and reconciliation, blanket recognition is not possible. The clear message from both Aboriginal and non-Aboriginal commentators is that the potential for recognition of particular laws and practices to impact upon protected individual human rights must be determined on a case-by-case basis. This is considered essential not only to protect the fundamental human rights of all Australians, but also to protect the rights of vulnerable groups, such as women and children, within the indigenous minority.

The Commission has already voiced its opinion that Aboriginal customary laws and culture should be appropriately recognised in Western Australia and that such recognition can take many forms including constitutional, administrative, legislative and judicial. In view of the potential conflict described above, the Commission has taken, as its threshold test for recognition, the consistency of relevant Aboriginal customary laws or practices with international human rights standards. The Commission also recognises that international human rights standards and the decisions of international treaty bodies provide important benchmarks against which the protection and promotion of the rights of Aboriginal people in Western Australia can be measured.⁶⁷

Proposal 5

Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis.

Recognition of Aboriginal Customary Law in Other Countries

Although not required by its Terms of Reference, the Commission has been informed by the development of recognition of Aboriginal customary laws in other countries, in particular New Zealand, Canada and Papua New Guinea. The Commission has found that, despite the differences in colonial backgrounds (especially the existence of treaties between the colonising power and indigenous peoples in Canada and New Zealand) and the levels of recognition of Aboriginal customary laws, the indigenous populations of these countries are facing similar social and cultural problems to those found in Australia. But although Western Australia can be informed by recognition initiatives and responses to indigenous disadvantage in these other countries, the substantive differences between our indigenous populations cannot be ignored and detailed comparison is therefore of limited value. Thus, in the following Parts, the Commission has made overt reference to the experiences of non-Australian jurisdictions only where these experiences are found to be directly relevant to the examination of the particular areas of Western Australian law discussed in this paper.

67. See Marks G, *The Value of Benchmarking to the Reduction of Indigenous Disadvantage in the Law and Justice Area*, LRCWA, Project No 94, Background Paper No 3 (June 2004).

PART V

Aboriginal Customary Law and the Criminal Justice System

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Introduction

This part examines the need for recognition of Aboriginal customary law in the criminal justice system. There is no clear guidance from Western Australian courts about the circumstances and manner in which customary law can be taken into account. Because of the absence of any legislative direction requiring Aboriginal customary law to be considered, any recognition has been reliant upon the individual views of people who work in the criminal justice system and also upon the extent of their knowledge of all relevant aspects of customary law. Judicial recognition of Aboriginal customary law has for the most part been limited to cases involving traditional punishment. The Commission's consultations with Aboriginal people across the state, and the extensive research undertaken for this project, supports the view that Aboriginal customary law should be acknowledged in its broadest sense.

The Commission makes extensive proposals with the aim of providing more consistent and reliable recognition of Aboriginal customary law. Although judicial officers, police officers and other agencies within the criminal justice system will retain discretion about whether and how Aboriginal customary law will be recognised in any particular case, the proposals aim to ensure that criminal justice agencies are required to consider the issue.

Any discussion about Aboriginal people and the criminal justice system cannot and should not ignore the issue of over-representation of Aboriginal people within the system. Many of the Commission's proposals aim to reduce the level of over-representation of Aboriginal people in the criminal justice system. A significant reduction in the rate of imprisonment of Aboriginal people is required not only because it is necessary for the welfare and aspirations of Aboriginal people but also because the 'mass incarceration' of Aboriginal people in this state is 'destructive of Aboriginal law and culture'.¹

The Western Australian criminal justice system is failing Aboriginal people and it is time for a new approach. Aboriginal customary law may well provide a solution to the unacceptable and disproportionate rate of Aboriginal imprisonment and detention. Customary law processes have the potential to reduce the level of over-representation by invoking more effective and appropriate ways to address law and order issues in Aboriginal communities.

The extent to which Aboriginal people practice and observe Aboriginal customary law varies from place to place. In some communities traditional law has broken down as a consequence of colonisation. During the Commission's consultations the need to revitalise aspects of customary law, in particular the cultural authority of Aboriginal Elders, was emphasised.² For example, in Broome it was stated that Aboriginal people 'needed to reclaim community values existing before the white man came, so as to "get comfort for our people in mind and heart"'.³ Underlying many of the Commission's proposals is the need to enhance the cultural authority of Elders. One way to accomplish this is to provide an opportunity for Elders to take an active role in the criminal justice system. In addition, Aboriginal communities and Elders need to be empowered to determine their own solutions to social and justice issues and the Western Australian justice system must provide a space for Aboriginal customary law processes to develop.

The Commission acknowledges that from an Aboriginal perspective, although the recognition of customary law is paramount, many practical issues were also at the forefront of the consultations. Wherever possible the Commission has suggested practical improvements to the administration of criminal justice and provided ways in which Aboriginal people can become directly involved in decisions that are likely to impact on them and on their communities.

1. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 7 (December 2004) 7. See also LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5 where it was stated that all 'teaching gets left behind when people are going through the law but then get sent to prison – they miss out on law and knowledge'.
2. LRCWA, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 7; LRCWA, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 3.
3. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 21.

Traditional Aboriginal Law and Punishment

Due to the diversity of Aboriginal people in Western Australia and the secret nature of certain aspects of customary law, it is impossible to comprehensively identify all traditional offences, punishments and dispute resolution methods employed by Aboriginal people. It is also, as discussed in Part III of this Paper, undesirable to attempt to confine and codify Aboriginal customary law from a non-Aboriginal perspective.

In its 1986 report on the recognition of Aboriginal customary law, the ALRC warned against comparing 'notions of the criminal law (breach and subsequent punishment) to departures from kinship rules and expected norms of behaviour' under customary law.¹ While the Commission agrees with the ALRC in principle, it is of the opinion that in order to identify opportunities for recognition of Aboriginal customary laws in the Western Australian legal system, it is necessary to examine, so far as is possible, the similarities and differences between forms of 'criminal' law and punishment under Aboriginal customary law and Australian law.

The Foundation of the Law

Under Australian law there is a clear separation between legal matters and religious, social or moral standards.² In contrast, traditional Aboriginal law is inextricably linked to Aboriginal religion. The Dreamtime provides the source of acceptable codes of behaviour in all aspects of life. As observed by Berndt and Berndt:

[T]he mythical [Dreamtime] characters instituted a way of life which they introduced to human beings: and

because they themselves are viewed as eternal, so are the pattern they set.³

Aboriginal customary law does not distinguish between standards of social behaviour, sacred matters and binding rules: they are all 'the law'.⁴ The discussion in Part VI below, concerning the law of tort, shows that under Aboriginal customary law there is no clear distinction between civil law and criminal law matters in the general law understanding of those terms.⁵ Rather, under traditional law the distinction is made between public and private wrongs. Kenneth Maddock referred to the general categorisation of public matters as criminal and private as civil; however, he observed that the boundaries between the two are not always clear.⁶

Public wrongs include breaches of sacred law, incest, sacrilege or murder by magic; while private wrongs include homicide, wounding and adultery. The essential difference lies in the manner by which the dispute is resolved. For public wrongs, Elders are actively involved; whereas for private wrongs, the person who has been harmed (and their relevant kin) generally determines the appropriate response.⁷

Responsibility Under the Law

As with the nature of law itself, the concept of responsibility for breach of Aboriginal customary law differs from Australian criminal law. Fault—which includes concepts such as intention, recklessness and accident—is the primary indicator of criminal responsibility under Australian law. While Aboriginal customary law does

1. Australian Law Reform Commission (ALRC), 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.
2. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 81–82.
3. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 336.
4. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 82; ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.
5. Toohey J, *Understanding Aboriginal Law* (1999) 32 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 5 (September 2004).
6. Maddock K, 'Aboriginal Customary Law' in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law* (Sydney: Allen and Unwin, 1984) 219.
7. A further distinction is that public wrongs require an obligatory response whereas private wrongs do not. The outcome for the latter in one case will in no way influence or determine the outcome for another similar case (ibid 232). There is also evidence to suggest that what commences as a private dispute may turn into a public matter and therefore be subject to the authority of the Elders. In this situation, Elders may intervene to prevent a matter from escalating into a feud, rather than deciding upon the appropriate punishment. See Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 67–68.

sometimes consider these issues in apportioning responsibility,⁸ the primary focus is on causation.⁹ In many instances under Aboriginal customary law, liability is strict. For example, if someone accidentally witnessed a prohibited ceremony or happened upon a sacred site, that person would be liable to punishment, regardless of motive or intention.¹⁰ During the Commission's consultations it was stated that 'under traditional law it is not important why you did what you did'.¹¹

The concept of causation is also different. While Australian law views causation in a 'mechanical sense', Aboriginal customary law considers indirect social causes.¹² For example, in the Commission's consultations at Fitzroy Crossing it was reported that an Aboriginal man was punished because someone fell from the back of a truck that he was driving:

The very fact that someone had died when he was in charge of the vehicle meant he had broken Aboriginal law irrespective of whether he was 'at fault' in the western legal sense.¹³

This demonstrates that the concept of responsibility under Aboriginal customary law remains constant even in its application to contemporary situations.¹⁴

Traditional Dispute Resolution

Responsibility for Dispute Resolution

Anthropologists and other commentators have expressed divergent views about whether traditional Aboriginal societies possessed authority structures (such

as a headman¹⁵ or a tribal council) or whether order was maintained through religious and kinship obligations.¹⁶

Referencing the practices of Aboriginal people at Jigalong in the 1960s, Robert Tonkinson described an 'informal council of initiated men' who dealt with religious matters as well as calling public meetings to deal with grievances. These meetings would continue until consensus was reached on how to deal with the grievance (or until there was no longer any public opposition), at which time punishment in the form of 'public denigration' or physical sanctions would take place.¹⁷ Tonkinson further explained that, traditionally, religious leadership would change according to the nature of the ritual or ceremony. In non-religious matters the head of the family was the leader and kinship governed what took place.¹⁸ Similarly, Kathryn Trees was told, during research for her background paper, that under traditional law families of the offender and the person who was harmed would negotiate the outcome and kin relationships would determine who would inflict the punishment.¹⁹

Order therefore appears to be maintained through self-regulation and consensus between family heads in Aboriginal society. When disputes do occur, kinship principally determines the manner in which individuals will respond.²⁰ That is not to say that there is complete freedom in the response: appropriate responses are known to all and must be followed. Failure to respond appropriately may lead to further transgression under

8. Nancy Williams states that the Yolngu people when dealing with a dispute would 'try to discover the ill-will' such as being 'pushed' to seek revenge on behalf of another: see Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 73.
9. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [414].
10. ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 220.
11. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.
12. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 6.
13. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 4. See also LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 20. In his background paper to this reference, Philip Vincent refers to a similar example where an Aboriginal person was held responsible for the death of a female passenger who had stepped in front of his parked car and was run over by a passing vehicle. The explanation for responsibility under Aboriginal customary law was that the driver should not have taken the woman in the car in the first place: see Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 6.
14. For further discussion of the concepts of liability and responsibility under Aboriginal customary law, see Part VI 'Tortious Acts and Omissions', below pp 267–70.
15. Adolphus Elkin concluded that in traditional Aboriginal society there were headmen who would control meetings and make decisions: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 15.
16. Edwards WH, 'Leadership in Aboriginal Society' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 161. See also Maddock K, 'Aboriginal Customary Law' in Hanks P & Keon-Cohen B (eds), *Aborigines and the Law* (Sydney: Allen and Unwin, 1984) 226. Robert Tonkinson concluded that 'Aboriginal society has no chiefs or law enforcement specialists': see Tonkinson R, 'Mardu Jarra Kinship' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 155. Larrisa Behrendt observed that there were examples in traditional Aboriginal society where a council of Elders would decide the issue: see Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 19. Some anthropologists have taken a position somewhere in between these two views: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Company, 1991) 205.
17. Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings, 1974) 62–63.
18. *Ibid.*
19. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 20.
20. Tonkinson R, 'Mardu Jarra Kinship' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 156.

Aboriginal customary law.²¹ As observed by John Nicholson:

Decisions were generally brought about by consensus guided by the elders well known (indeed, often related) to, and respected by the parties, with little place for coercion to enforce a decision or punishment.²²

Generally, for more serious matters (especially those involving breaches of sacred law), authority is vested in Elders. There is also evidence that when a dispute is not able to be resolved within a family or kin group, Elders may be caused to intervene.²³ The advice of Elders in traditional societies was usually 'heeded and unquestioned'.²⁴

Early anthropological studies focused on the authority of male Elders; however, more recently it has been accepted that Aboriginal women 'play an important role in the maintenance of order and resolution of disputes'.²⁵ Sharon Payne has observed that:

Traditionally, women in Aboriginal culture have a status comparable with and equal to men. They have their own ceremonies and sacred knowledge, as well as being custodians of family law and secrets. They supplied most of the reliable food and had substantial control over its distribution. They were the providers of child and health care and under the kinship system, the woman's or mother's line was essential in determining marriage partners and the moiety (or tribal division) of the children.²⁶

Aboriginal women have been described as powerful 'conciliators and negotiators' and they have also at times

been involved in carrying out punishments.²⁷

The conflicting views in relation to who had the ultimate authority in traditional Aboriginal societies have no doubt arisen because of the diversity of Aboriginal people and changes that have occurred in Aboriginal communities since colonisation. As the ALRC has said:

The time has gone when the correct position can be ascertained. However, the issue may be relevant to a determination whether and, if so, how and in whom, authority to administer law, be it Aboriginal or Australian law, should be vested in any section of modern Aboriginal society.²⁸

The evidence before the Commission demonstrates that the responsibility for maintaining law and order and for resolving disputes will vary depending upon the nature of the dispute and the community in which the dispute takes place.

Methods of Dispute Resolution

The ALRC found that in 'many, if not all, Aboriginal communities there exist methods for social control and the resolution of disputes'.²⁹ Berndt and Berndt have stated that, in most parts of Australia, discussions or meetings (as distinct from formal judicial processes under Australian law) were held to resolve disputes and grievances. This would usually occur during ceremonial times when there is an obligation not to fight.³⁰ As mentioned above, the method of dispute resolution will often depend upon whether it is a private

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21. Toohey J, *Understanding Aboriginal Law* (1999) 27 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
 22. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 87.
 23. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 349; ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 224.
 24. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 14. Elders have been described as those who are the most knowledgeable of religious and ceremonial matters as distinct to just being the oldest members of the community: see Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 20.
 25. ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 219. In his background paper Toohey notes that most of the early anthropologists were men and that they obtained their information primarily from men: see Toohey J, *Understanding Aboriginal Law* (1999) 23 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
 26. Payne S, 'Aboriginal Women and the Law' in Eastale P & McKillop S (eds), *Women and the Law* (Australian Institute of Criminology Conference Proceedings No 16, Canberra, 1993) 65.
 27. In one example from the Kimberley, the carrying out of the punishment imposed on an Aboriginal woman after the death of her husband was the responsibility of her mother-in-law and sister-in-law: see Toussaint S, *Phyllis Kaberry and Me: Anthropology, history and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 87–88. The important role of women Elders is also referred to in Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 13. An interesting method of resolving disputes was observed in the Kimberley: when two men of the same skin group were fighting, a woman (who the men were obliged to avoid under customary law) placed herself naked in between the fighting males and because they were unable to continue the fight without looking at her, the fight would cease: Syddall T, 'Aboriginals and the Courts' in Swanton B (ed), *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984) 158.
 28. ALRC, *Aboriginal Customary Law – Recognition?*, Discussion Paper No 17 (1980) 12.
 29. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [692]. Berndt and Berndt stated that in 'all Aboriginal societies there are certain approved mechanisms—the council, the meeting, the magarada or ordeal, armed combat and the duel, and the inquest—whereby infraction may be resolved': see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 360.
 30. Berndt & Berndt, *ibid* 347.

or public matter. Nancy Williams describes ways in which a private grievance may become public, including by public declaration by the person aggrieved or by withdrawal from an important activity to demonstrate that the person was in a dispute.³¹ Once a dispute became public other members of the community would then become involved.

The ALRC reported that in the Strelley community in Western Australia, regular community meetings were held which involved communal decision-making and negotiation to resolve disputes. These meetings were structured and took place in a circle format with the offender sitting inside. A 'ten-man committee' was authorised by the community to apprehend offenders (even if they were outside the community) and bring them before a community meeting.³² The ALRC stressed that this 'ten-man committee' could only act if the community initiated action and that the determination of sanction was made by the community.³³

The ALRC also highlighted that in many cases dispute resolution methods had been affected by the interaction with non-Aboriginal people and Australian law and that Aboriginal customary law had proved 'remarkably resilient, and able to adapt to changing circumstances'.³⁴ For example, at the time of the ALRC inquiry, the Edward River community in Queensland used customary law methods of dispute resolution as well as community courts.³⁵ In the Northern Territory, dispute resolution methods at the Yirrkala community involved intervention by senior members of the community who considered the facts, obtained admissions and applied sanctions. An essential feature of this process, which was called a 'moot' by Williams, was the active involvement of disputants and other interested parties who would discuss the matter.³⁶

Features of Aboriginal Dispute Resolution

Restoration of peace

An important feature of Aboriginal dispute resolution is the focus on healing or the restoration of peace between the affected parties.³⁷ While it is clear that retribution is relevant to Aboriginal customary law dispute resolution, Berndt and Berndt suggest that underlying the 'verbal emphasis on revenge' is a general aim to restore balance and order.³⁸ There are limits to the extent of retaliation permitted under Aboriginal customary law. If punishment has been inflicted properly then the matter is usually at an end; however, if the punishment has gone too far as a result of the over-emphasis on revenge, then further conflict may result. This further conflict (often referred to as feuds) may in fact indicate that traditional law has broken down.³⁹

This may be contrasted with the position under Australian criminal law which avoids concepts of retaliation or revenge. The principles of sentencing, which require punishment to reflect the seriousness of the conduct from the point of view of an objective arbitrator, do not incorporate the views of the victim or their families as to what constitutes the appropriate punishment.

Collective responsibility and community involvement

Aboriginal dispute resolution methods generally involve families and communities. Underlying traditional law is the concept of collective rights and responsibilities which is different from the western focus on individual rights.

31. Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 74, 87. Nancy Williams distinguishes between grievances and disputes: conflicts are grievances but disputes are those matters that have become public (at pp 67–68).
32. In his background paper Harry Blagg explains that this ten-man committee ceased to operate in the mid-1980s as it lost the support of the police and people were concerned about the coercive methods used by the committee to bring people back to the community: see Blagg H, *A New Way of Doing Justice Business? Community justice mechanisms and sustainable governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 29. During consultations in the Pilbara some Elders expressed the view that since the committee had ceased to operate behaviour had declined: see LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 6.
33. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [713]–[718].
34. *Ibid* [692].
35. *Ibid* [694]–[699].
36. *Ibid* [707]–[712]. The ALRC referred to the extensive research that had been undertaken by Nancy Williams in relation to dispute resolution methods at Yirrkala during a 12-month period from 1969–1970.
37. Berndt and Berndt describe a public and ritualised washing of those who were involved in a dispute in order to 'heal dissension and make for mutual goodwill between the participants': see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 350. Many cases that have come before the courts have also referred to the purpose of traditional punishment as healing and restoration of peace within the community: see *R v Minor* (1992) 59 A Crim R 227, 228 (Asche CJ); *R v Wilson Jagamara Walker* (1994) 68(3) *Aboriginal Law Bulletin* 26; *R v Sampson* (Unreported, Supreme Court of the Northern Territory, SCC 9824061, Angel J, 26 March 2001); *R v Corbett* (Unreported, Supreme Court of the Northern Territory, SCC 20200373, Angel J, 16 April 2003).
38. Berndt & Berndt, *ibid* 362. The Commission notes that indigenous notions of justice in other countries also focus, although not exclusively, on concepts of healing and the restoration of peace: see Cousins M, 'Aboriginal Justice: A haudenosaunee approach' (2004) 9(1) *Justice as Healing: A newsletter on Aboriginal concepts of justice* (Native Law Centre) 1.
39. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 21, 24.

Kinship relationships not only determine a person's rights and responsibilities to another but also impact on the process used to resolve a dispute.⁴⁰ During the Commission's consultations, Aboriginal people explained that customary law

enlists the family to prevent the offending in the first place, because of the prospect of retribution against the family if a member offends.⁴¹

Families are involved in deciding the punishment because Aboriginal law 'demands satisfaction between families when something wrong is done'.⁴²

Traditional Offences

Offences under traditional law have been categorised as falling under two main headings: breaches of sacred law and offences against other persons or property. The boundary between these categories is not always clear because some offences may cover both aspects, such as breaches of kinship avoidance rules.⁴³ Avoidance rules dictate the nature of permitted contact between particular kin, such as between a man and his mother-in-law. Avoidance rules may operate to prevent face-to-face contact, speaking to each other or mentioning each other's names.⁴⁴ It has been noted that the effect of these kinship rules can be seen during traditional meetings and ceremonies: people sitting apart from one another, facing different directions and communicating through another person.⁴⁵

Breaches of sacred law are public matters and therefore Elders are often directly involved in determining punishment. For example, it is an offence for women, children and uninitiated men to view certain sacred objects, places or ceremonies or for someone to disclose these matters to a person who is forbidden to see

them. Punishment for these offences is generally determined by ritual leaders and, in the past, might have involved death.⁴⁶

Offences against other persons or property would usually begin as private matters but, as mentioned earlier, could be made public by the person aggrieved. Offences against the person (which sometimes would also amount to a breach of sacred law) include unauthorised physical violence, murder, incest (which included classificatory as well as blood relationships), adultery, elopement,⁴⁷ insulting behaviour, and breach of a taboo such as referring to the name of a deceased.⁴⁸ There are also offences of omission such as the physical neglect of certain relatives, refusal to make gifts and refusal to educate certain relatives.⁴⁹ Offences against property were rare in traditional societies. As discussed in Part VI, most property was not individually owned in the Western legal sense and if a personal item (such as a digging stick, basket or spear) was needed, then it could be easily borrowed or demanded pursuant to kinship obligations.⁵⁰

Traditional Punishments

The Nature of Traditional Punishments

While there are clearly sanctions for behaviour that is contrary to Aboriginal customary law, those sanctions are not imposed in the same manner as punishments under Australian criminal law. The former are imposed in public and generally through family and community consensus, while the latter are imposed by a neutral, distant authority.⁵¹ The fact that punishments were carried out in public has been suggested as one reason

40. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 21.

41. LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 19.

42. LRCWA, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 40. See also LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2004, 4; *Mowanjun*, 4 March 2004, 49.

43. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 343. The ALRC noted that this distinction was not recognised by Aboriginal customary law: see ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 219.

44. ALRC, 'Traditional Aboriginal Society and its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.

45. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 13.

46. ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217.

47. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 84.

48. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 2, 22.

49. *Ibid.* For further discussion of these matters, see Part VI 'Tortious Acts or Omissions', below pp 269–73. A useful account of matters that constitute offences under Aboriginal customary law is Meggitt's study of the Walbiri tribe in 1962: see Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 85.

50. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 345. This view is supported by Nancy Williams. In her research at Yirkala there were no examples of any grievances associated with theft over a 12-month period: see Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 74.

51. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [499].



why in traditional Aboriginal society there was a high degree of compliance with the law.⁵²

Sanctions or punishments under traditional law differ from place-to-place. Examples discussed in this section are for illustrative purposes and to provide a background to the question whether any sanctions under Aboriginal customary law are in conflict with Australian law. Berndt and Berndt state that there were both positive and negative sanctions under Aboriginal customary law. Positive sanctions included rewards and social approval for those who conformed to codes of behaviour, such as complying with kinship obligations, and to those who were productive in hunting or food gathering.⁵³ The

sanctions considered below are examples of negative sanctions.

Examples of Traditional Punishments

Death

Death, either directly or through sorcery, was a traditional punishment under Aboriginal customary law. In addition to the threat of being killed for a breach of customary law it has been reported that in some cases the threat also involved the denial of mortuary rites.⁵⁴ In his background paper, John Toohey emphasises that transgressions of Aboriginal customary law which may once have resulted in punishment by death 'will rarely do so today'.⁵⁵ It is widely considered that death is no longer carried out as a punishment because of the consequences under Australian law.⁵⁶

Sorcery and supernatural punishment

While the parameters of supernatural punishments are, for obvious reasons, difficult to determine, it appears that they were integral to the control of certain behaviour in traditional Aboriginal society.⁵⁷ Insanity caused through sorcery by a non-human agency has also been categorised as a sanction.⁵⁸ Berndt and Berndt conclude that the fear of, or belief in, sorcery in traditional societies acted as a form of social control and a 'powerful legal sanction'.⁵⁹ On the other hand, in some places (or in some situations) sorcery is regarded as a violation of customary law.⁶⁰

The Commission acknowledges that belief in sorcery remains important to many Aboriginal people and may influence their behaviour.⁶¹ With growing reluctance to use sanctions that may constitute an offence under

52. DeBelle B 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 86.
53. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 341.
54. Ibid 343. For further discussion of funerary and mortuary practices and their importance to Aboriginal society, see Part VI 'Funerary Practices', below pp 310–11.
55. Toohey J, *Understanding Aboriginal Law* (1999) 19 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
56. McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project 94, Background Paper No 9 (February 2005) 42–43. However, the Commission notes that recently the Supreme Court of Western Australia was informed by an offender that he would face death as a traditional punishment upon his release from prison: see *The State of Western Australia v Dann* (Unreported, Supreme Court of Western Australia, No 131 of 2005, Hasluck J, 26 October 2005).
57. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 342.
58. DeBelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 85–86.
59. Ibid.
60. Toohey J, *Understanding Aboriginal Law* (1999) 31–32 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).
61. In her background paper, Kathryn Trees refers to a specific example that shows that the power of threats of sorcery continue today. In that example, both the offender and his family members felt compelled to submit to punishment as a result of the fear of the feather foot. See Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 35–37.

Australian law 'there is a temptation to employ sorcery because of its covert nature' and to use it when the offender is not present to undergo physical punishments.⁶² While the recognition of sorcery is clearly outside the bounds of Australian law, the Commission understands that in situations where an offender is unable to undergo traditional punishment, such as where they are in prison, the threat of sorcery may be very real.⁶³

Physical punishments

Physical punishments that involve beatings or spearing (often referred to as 'payback') are perhaps the most well-known and controversial aspects of Aboriginal customary law. The formal sanction of spearing in the thigh has been used for offences as diverse as murder, adultery, elopement and personal injury. The process may involve the recipient standing quietly and 'offering no resistance' while the aggrieved person, or one of their kin, throws the spear.⁶⁴ Berndt and Berndt describe various examples of ritualised spearing duels. The common elements are the involvement of kin and the role of the Elders to ensure that there is a degree of restraint by opposing parties. The matter would generally be resolved once the offender had been speared in the thigh or blood had been drawn.⁶⁵

Examples of physical punishments show that it is not always the case that serious injury is intended. One example from the Kimberley shows that while numerous people were involved in throwing boomerangs, digging sticks and blunted spears, all those involved 'knew that none of the implements would be thrown with such force or accuracy as to maim or permanently harm those being punished'.⁶⁶ An Aboriginal woman explained a punishment for the deaths of two men in a car accident in the following way:

Everyone is [going to] fight together so those men can go free ... the relations of the people who were finished—the brothers and sisters—are going to fight those men ... hit them with boomerangs and sticks so they will fall down and cry and be sorry for what happened ... they will be free to walk around ... No-one will be thinking about that anymore ... no-one will be worrying for that anymore.⁶⁷

In relation to physical punishments it has been said that the primary purpose is to resolve the grievance and restore balance between the disputants.⁶⁸ As Toohey suggests 'the idea is to give the family of the injured person satisfaction and thereby bring the matter to an end' and because it occurs in public everyone knows that the matter has been finalised.⁶⁹ The continuing use of physical punishments in contemporary Aboriginal society is a major source of conflict with Australian law.⁷⁰

Banishment or exile

The extent of the use of banishment as a punishment under Aboriginal customary law has been the subject of some debate. Exile or banishment has been described as an extremely harsh punishment and was not embraced by all Aboriginal societies.⁷¹ There is, however, clear evidence that exile or banishment has been used, and continues to be used, by Aboriginal communities as a sanction for breaching Aboriginal customary law.⁷² Temporary exile to another place (often where there were relatives who were known to the offender) was one of the main sanctions employed by the Yolngu people at Yirrkala.⁷³ Temporary internal exile—where the offender is prevented from entering certain areas where an aggrieved person may be—was also used.⁷⁴

62. Toohey J, *Understanding Aboriginal Law* (1999) 32 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

63. In the matter of an application by Anthony, the court was told that the accused, who was applying for bail, was concerned that if he did not undergo traditional punishment he may be 'cursed by Aboriginal magic which might kill him while he is in gaol': Anthony [2004] NTSC 5, [16].

64. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 347.

65. Ibid 350–51. In North-Eastern and Western Arnhem Land this was referred to as the 'Magarada'.

66. Toussaint S, Phyllis Kaberry and Me: *Anthropology, history and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 91.

67. Ibid.

68. Ibid 91–92.

69. Toohey J, *Understanding Aboriginal Law* (1999) 29 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

70. The complex issues in this area are considered later in this Part: see 'Criminal Responsibility – Consent', below p 163.

71. DeBelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 86 where the author refers to Meggitt's study of the Walbiri people and that exile was never used by them.

72. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [500], [717]; and see the discussion of cases involving banishment that have come before the courts in Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 19.

73. Williams N, *Two Laws: Managing disputes in a contemporary Aboriginal community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 97.

74. Ibid 98.

The Commission's consultations with Aboriginal people . . . demonstrate that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.

Ridicule and shaming

Robert Tonkinson states that a 'pervasive fear of shame or embarrassment' generally maintains the system of kinship obligations, especially avoidance rules that require the exercise of restraint in interactions between specific kin.⁷⁵ Ridicule (including swearing and gossiping) has been described as a method of controlling quarrels or disputes, but it could also at times backfire and provoke further trouble.⁷⁶ One view is that ridicule was usually directed at offences involving neglect – such as the refusal to make gifts or care for certain family members.⁷⁷ Trees was told by a senior Aboriginal man from Roebourne that when a person offended they would often be put into the middle of a circle with everyone talking and 'making them feel shame for what they had done'.⁷⁸

The ALRC referred to 'shaming and public ridicule' as a traditional punishment that continues to be used by Aboriginal people.⁷⁹ It is clear that ridicule and shaming carried out with reference to kinship roles was, and remains, an important aspect of maintaining order in Aboriginal communities. To be effective as a sanction, shaming must be carried out by the correct person in the correct situation.

Compensation

Although it does not appear to be common, there is some evidence of sanctions involving compensation. Berndt and Berndt report that compensation was sometimes used in cases of death, but its use would not necessarily mean that other forms of punishment would not also take place.⁸⁰ The ALRC noted that use of compensation as a way of resolving disputes was increasing among Aboriginal communities and that some communities had modified the sanction of compensation to include informal fines as well as goods.⁸¹

Contemporary Situation

The Commission's consultations with Aboriginal people (as well as information contained in numerous cases that have come before the courts) demonstrate that many Aboriginal people in Western Australia remain subject to Aboriginal customary law offences and punishments.⁸² Modifications to traditional punishments have nonetheless evolved, in part, as a result of the effects of Australian law (in particular, the fact that Aboriginal people who inflict physical punishments under Aboriginal customary law may well be prosecuted for offences against Australian law)⁸³ and in part as a result

75. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rhinehart and Winston, 1978) 47.

76. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 341.

77. Debelle B, 'Aboriginal Customary Law and the Common Law' in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1997) 86.

78. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 20.

79. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [500]–[501]. For example, the Strelley community was said to use 'growling', ridicule or shaming [717]. A Kimberley magistrate has also observed a sanction that he described as public haranguing and that aggrieved persons would 'growl' at the culprits in public: see Syddall T, 'Aboriginals and the Courts' in Swanton B (ed), *Aborigines and Criminal Justice* (Canberra: Australian Institute of Criminology, 1984).

80. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 346.

81. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [500]–[501], [826]. The ALRC mentioned that the Strelley community in Western Australian used fines and community work in its resolution of disputes: see [717].

82. In her background paper, Victoria Williams identifies a number of sanctions that have been taken into account by Australian courts when sentencing Aboriginal people during the past 20 years including spearing, physical beatings, banishment, public meetings and reprimand (shaming). See Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 18–20.

83. In Tonkinson R, *The Jigalong Mob: Aboriginal Victors of the Desert Crusade* (California: Cummings, 1974) 66–67 it was stated that Aboriginal people at Jigalong had modified certain behaviours, such as taking wives under the age of 16 years and the punishment of death by spearing, as a consequence of Australian law. Also Nancy Williams stated that at Yirrkala during 1969–1970 physical sanctions were used less frequently because of the possible intervention of Australian law: see Williams N, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 101.

of changing circumstances facing many Aboriginal people.⁸⁴ For example, during her study at Yirrkala, Williams noted that removal from employment was used as a sanction for breaching customary law.⁸⁵ Similarly, the practice of spearing has been modified in some cases due to appreciation by Aboriginal people that an offender's physical health might not withstand such punishment.⁸⁶

Even where traditional law has changed, as long as it retains its 'essential character' it can still properly be regarded as Aboriginal customary law.⁸⁷ It is on this basis that traditional punishments inflicted while under the influence of alcohol are not regarded by Aboriginal people or by courts to properly represent Aboriginal customary law.⁸⁸

During the Commission's consultations many communities referred to the important role of Elders. Some communities were concerned at the breakdown of the traditional role of Elders and the lack of respect for Elders shown by many young people.⁸⁹ In Roebourne, Trees was told that Elders should always have 'the final say' in disputes; however, it is now often the 'strongest person' who exercises control because there are not enough Elders to maintain order and pass on knowledge.⁹⁰ A number of the Commission's proposals therefore aim to assist dispute resolution in Aboriginal communities by creating the means by which the cultural authority of Elders can be recognised and respected.⁹¹

Conflict with Australian Law

All Aboriginal people in Western Australia are subject to Australian criminal law.⁹² As stated by Trees 'the general legal system governs people's lives irrespective

of customary law, and customary law operates irrespective of the general legal system'.⁹³ However, there are some aspects of Aboriginal customary law that are in direct conflict with Australian criminal law, such as the fact that a person inflicting traditional punishment may commit an offence under Australian law; the existence of different dispute resolution methods; and the problem of double punishment.

The unlawfulness of some aspects of Aboriginal customary law (in particular, punishments that cause death, grievous bodily harm or wounding) means that Aboriginal people may be dealt with for an offence under Australian law when the conduct is required under Aboriginal law. The Commission's consultations revealed that many Aboriginal people were concerned that people who were authorised to inflict certain traditional punishments were liable to arrest and imprisonment under Australian law.⁹⁴ The complex issues in relation to the legality of traditional punishments are considered by the Commission in the context of defences under Australian law.⁹⁵

There are crucial differences between the Australian legal system and the process of Aboriginal dispute resolution, including that:

- Aboriginal dispute resolution methods involve the family and the community, while in the Western legal system strangers determine disputes and impose punishment;
- the disputants are directly involved in customary law processes compared with the use of advocates under the Australian legal system; and
- Aboriginal customary law decision-making is collective and by consensus, rather than the hierarchical nature of decision-making found under Australian law.⁹⁶

84. In Part III the Commission concluded that there is nothing in the terms of reference for this project that limit the consideration or recognition of customary laws that have remained unchanged since colonisation: see Part III 'Is Aboriginal Customary Law 'Frozen in Time?', above p 52.

85. Williams N, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Canberra: Australian Institute of Aboriginal Studies, 1987) 100.

86. Consultations showed that Aboriginal people in Cosmo Newbery accepted that spearing could be fatal if someone had diabetes or a heart condition: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 19; *Pilbara*, 6–11 April 2003, 10.

87. McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project 94, Background Paper No 9 (February 2005) 43.

88. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 14; *Pilbara*, 6–11 April 2003, 9–10; *Broome*, 17–19 August 2003, 23.

89. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13; *Carnarvon* 30–31 July 2003, 3; *Wiluna* 27 August 2003, 22; *Meekatharra*, 28 August 2003, 30; *Mowanjun* 4 March 2004, 48.

90. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 31.

91. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.

92. The High Court of Australia (Mason CJ) held in *Walker v The State of New South Wales* (1994) 126 ALR 321 that criminal laws apply to Aboriginal people.

93. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – a case study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 7.

94. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 6; *Wuggubun*, 9–10 September 2003, 37.

95. See discussion under 'Criminal Responsibility' and in particular 'Consent', below p 163.

96. Behrendt L, *Aboriginal Dispute Resolution: A step towards self determination and community autonomy* (Sydney: Federation Press, 1995) 22.



Aboriginal people who are dealt with by the Australian criminal justice system may be alienated by the process and Aboriginal communities are disillusioned by their lack of involvement in the punishment of offenders. The fact that family and community members are involved in dealing with 'offenders' under customary law provides strong support for establishing mechanisms whereby Aboriginal people can be directly involved in the criminal justice system.

It is a reality that as a consequence of facing two laws, many Aboriginal people may also face two punishments. This issue continues to be a grave concern for Western Australian Aboriginal people.⁹⁷ Australian common law has long accepted that a person cannot be punished twice for the same offence and the *Sentencing Act 1995* (WA) provides that if evidence that establishes one offence also establishes another offence, the

offender can only be sentenced for one of the offences.⁹⁸ Given that under customary law once punishment has been carried out the matter is at an end, it may be extremely difficult for a traditional Aboriginal person to understand the necessity for further punishment to occur under Australian law. The corollary is just as difficult to fathom: upon being arrested and imprisoned under Australian law (sometimes for many years) that person will still be required to undergo traditional punishment upon release.⁹⁹ The need for Australian law to recognise the problem of double punishment is considered in the section on sentencing.¹⁰⁰

The Commission's View

The preceding discussion demonstrates that Australian criminal law differs vastly from its nearest equivalent under Aboriginal customary law. The question what constitutes Aboriginal customary law is properly a matter for Aboriginal people and not something that the Commission is in a position to determine. Similarly, the Commission is not in a position to dictate the precise nature of the Elders' involvement: the customary laws of the relevant community will determine these boundaries. However, it is important to recognise and support the authority of Elders (including female Elders) and to refrain from imposing unnecessary restrictions on how Elders must resolve disputes within their communities.

The Commission considers that the basic legal foundations of criminal law in Western Australia cannot be altered to recognise Aboriginal customary law. However, where appropriate, legislative provisions, procedures and practices can be adapted in ways that enable aspects of Aboriginal traditional law and punishment to be accommodated in order to assist Aboriginal people to obtain the full protection of (and avoid discrimination and disadvantage within) the criminal justice system.

97. McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project 94, Background Paper No 9 (February 2005) 41.

98. *Sentencing Act 1995* (WA) s 11.

99. The Commission notes that when an Aboriginal person is unavailable for punishment under customary law, family members may become liable to face punishment instead. This issue is considered in more detail under 'Traditional Punishment and Bail', below pp 198–201.

100. See discussion under 'Sentencing – Double Punishment', below p 214.

Aboriginal People and the Criminal Justice System

The history of Aboriginal people and the criminal justice system in Western Australia has been marred by discrimination, over-regulation and unfair treatment.¹ Part II provides a brief discussion of the history of Aboriginal people and the impact of colonisation in Western Australia and emphasises that past government policies and laws have shaped Aboriginal peoples' contemporary perceptions of the justice system. The examples considered immediately below are not intended as a comprehensive overview of the history of Aboriginal people and the justice system; rather they should be understood as a snapshot of particular instances of discriminatory treatment.

Prior to 1967 Aboriginal people were commonly brought before criminal courts for reasons directly related to their Aboriginality. For example, laws concerning the possession of alcohol and movement on and between reserves only applied to Aboriginal people.² Until the 1950s Aboriginal people were banned from entering towns unless lawfully employed and it was an offence for them to leave their place of employment without the permission of the Commissioner of Native Affairs.³ The relationship between Aboriginal people and the police was significantly damaged by the role that police officers played in removing children from Aboriginal families and enforcing discriminatory legislation.⁴ This has created 'an all-pervading mistrust of authority'.⁵ During the period 1936–1954, Courts of Native Affairs were established to deal with cases of murder and serious assault where both the accused and the victim were Aboriginal. Although the legislation provided that 'tribal' issues could be taken into account, in practice

these provisions were ineffective. Further, there was no right to choose the mainstream system, no right to a trial by jury and no right of appeal.⁶ Until 1952 Aboriginal witnesses were placed in custody to ensure their attendance at court.⁷

During the Commission's consultations it was stated that the 'system was biased against Aboriginal people and discriminated against them at all levels'.⁸ Despite the abolition of blatant discriminatory laws and policies, 'structural racism' or bias within the Western Australian justice system remains. As explained by the Inspector of Custodial Services, structural racism refers to the discriminatory *impact* of laws, policies and practices, rather than individual racist attitudes.⁹ Structural racism is judged according to outcomes not intentions and is 'more insidious than overt attitudinal racism and more difficult to challenge and confront'.¹⁰ Structural racism contributes to the over-representation of Aboriginal people within the criminal justice system.¹¹

In 1991 the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) completed a comprehensive inquiry dealing with the treatment of Aboriginal people in the criminal justice system. It concluded that Aboriginal people throughout Australia were being arrested, imprisoned and detained at a disproportionate rate to non-Aboriginal people. The RCIADIC made extensive recommendations aimed at reducing the level of Aboriginal involvement in the criminal justice system (including proposals to reduce social, economic and cultural disadvantage as well as changes to the criminal justice system itself).¹² However, the recommendations

1. Royal Commission into Aboriginal Deaths in Custody (RCIADIC), *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [5.1.1].
2. Johnston E, 'Aborigines and the Law' in Hinton M, Johnston E & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 102.
3. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) ch 2: 'Historical Perspective: Knowledge of the past to inform the present'.
4. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 239.
5. Eggleston E, *Fear, Favour of Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 10.
6. Written submission received Dr Kate Auty, August 2005.
7. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [5.1.1].
8. Law Reform Commission of Western Australia (LRCWA), *Thematic Summaries of Consultations* – Mirrabooka, 18 November 2002, 9.
9. Office of the Inspector of Custodial Services, *Report of an Unannounced Inspection of Eastern Goldfields Regional Prison*, Report No 4 (August 2001), 9–10.
10. *Ibid.*
11. See discussion below under 'Over-representation in the Criminal Justice System', below pp 95–99.
12. Johnston E, 'Aborigines and the Law' in Hinton M, Johnston E & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish Publishing, 1997) 105.

have not been fully implemented.¹³ It has been asserted that:

Implementation is not support for recommendations or the planning of policies ... Implementation is outcomes. This means changing legislation, changing priorities, changing cultures and changing procedures.¹⁴

At the ten year anniversary of the release of the RCIADIC's report, the former Aboriginal and Torres Strait Islander Social Justice Commissioner stated that 'the sense of urgency and commitment to addressing Indigenous over-representation in criminal justice processes had slowly dissipated'.¹⁵ The Commission is of the view that meaningful recognition of Aboriginal customary law must be accompanied by a resolute determination to substantially reduce the level of over-representation of Aboriginal people in the criminal justice system in this state.

Over-representation in the Criminal Justice System

The Level of Over-representation in the Criminal Justice System

Statistics

The statistics in relation to the over-representation of Aboriginal people in the criminal justice system are so well known that 'we are in danger of no longer being troubled by them'.¹⁶ Although the disproportionate rate

of imprisonment of Indigenous peoples is not unique to Australia, it has been argued that Australia has the worst record.¹⁷ Western Australia should be particularly troubled: it has the highest disproportionate rate of adult imprisonment and juvenile detention of Aboriginal people in Australia.¹⁸

Although only constituting about three per cent of the state's population, in 2004 Aboriginal people comprised 40 per cent of the prison population.¹⁹ For juveniles the position in Western Australia is indefensible: approximately 70 to 80 per cent of juveniles in detention are Aboriginal.²⁰ The Inspector of Custodial Services has commented that there is only one type of juvenile institution in Western Australia: 'Aboriginal juvenile detention centres'.²¹ The rate of arrest of Aboriginal people is also alarming. The proportion of Aboriginal people (adults and juveniles) that were arrested by police increased from 20 per cent in 1991 to 28.5 per cent in 2003.²²

Neil Morgan and Joanne Motteram observed that, 'legislative and policy initiatives to reduce imprisonment have simply not reached Aboriginal people'.²³ In 1996, in order to reduce the general imprisonment rate, sentences of three months' imprisonment or less were prohibited.²⁴ In 2004 under the *Sentencing Legislation Amendment and Repeal Act 2003* (WA) this was increased to six months' imprisonment or less. However, at the same time, the maximum penalty for many common offences (such as damage, breaching a restraining order, false name and certain traffic offences) was increased to nine or 12 months' imprisonment.²⁵

13. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 7–30; Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 110. The Commission notes that many Aboriginal people consulted for this project were concerned about the abolition of the Aboriginal Justice Council: see LRCWA, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 1; *Mirraboopa*, 18 November 2002, 7; Geraldton 26–27 May 2003, 17; Broome, 17–19 August 2003, 25; and *Aboriginal Legal Service*, 9 July 2003, 6. There is no longer an independent Aboriginal monitoring body in this state. The Commission has proposed the establishment of a statewide Aboriginal Justice Advisory Council to assist in the implementation of its proposal for community justice groups. This body could also take on the role of monitoring the implementations of the RCIADIC: see discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.
14. Dodson M, as quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 18.
15. *Ibid* 7.
16. Northern Territory, *Parliamentary Debates*, 16 October 2002, Record No 8 (Dr Peter Toyne, Attorney-General of the Northern Territory).
17. Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 95–96.
18. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 115, 137.
19. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 1, 17.
20. *Ibid* 1. The Commission notes that the disproportionate rate of Aboriginal detention has increased from 2003–2004. In 2003 Aboriginal children were 46 times more likely to be detained than non-Aboriginal children. In 2004 this figure increased to 52 times more likely. See Veld M & Taylor N, 'Statistics on Juvenile Detention in Australia: 1981–2004', Australian Institute of Criminology Technical and Background Paper No 18 (2005) 31.
21. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (August 2005) viii.
22. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 40–42. When the arrest statistics are separated for adults and juveniles, the position in relation to Aboriginal juveniles is alarming. Nearly 48 per cent of all juveniles arrested by the police in 2003 were Aboriginal.
23. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 18. For a discussion of some the legislative and policy initiatives, see pp 8–14 of the background paper.
24. Morgan N, 'The Abolition of Six-Month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's latest sentencing laws' (2004) 28 *Criminal Law Journal* 8, 9.
25. *Ibid* 15–16.

The abolition of sentences of imprisonment of three months or less did not reduce imprisonment rates and so far the abolition of sentences of six months or less does not appear to have had any positive impact.²⁶ Despite a fall in the general rate of imprisonment in Western Australia from 2001–2003, the rate of imprisonment of Aboriginal people has continued to rise.²⁷

Police diversion of juveniles

Since the introduction of the *Young Offenders Act 1994* (WA), there have been two formal methods of diverting juveniles from the criminal justice system: cautioning and juvenile justice teams.²⁸ It has long been accepted that throughout Australia Aboriginal juveniles are over-represented in the more punitive options (arrest and detention) and under-represented in diversionary options.²⁹ Eighty per cent of all non-Aboriginal juveniles that were formally dealt with by the police in 2001 were diverted. Only 55 per cent of Aboriginal juveniles formally dealt with by the police received the benefit of a diversionary option.³⁰ Statistics prepared by the Crime Research Centre for 2003 indicated that the proportion of Aboriginal juveniles being cautioned and referred to juvenile justice teams is improving.³¹ However, the introduction of cautioning and juvenile justice teams resulted in net-widening.³² In this context, net-widening means that a young person is formally diverted instead of being dealt with informally (such as by a verbal police warning). Because

diversionary schemes are intended to replace more punitive options any improvement in the rate of referral to diversionary options must take into account the effect of net-widening. Are Aboriginal juveniles being diverted in circumstances where non-Aboriginal juveniles would be dealt with more leniently?

The Commission stresses that even if Aboriginal juveniles are referred to diversionary options at the same rate as non-Aboriginal juveniles it will take a long time for the effects of past discriminatory practices to disappear. Earlier involvement in the system means that a young person accumulates a criminal record more quickly and this record is referred to in all future court appearances as a juvenile.³³ Although a juvenile record cannot generally be taken into account in an adult court,³⁴ a past criminal record may lead to increased and more intrusive attention by the police.³⁵

Aboriginal people over-represented as victims

Aboriginal people in Western Australia are also over-represented as victims. In 2003 Aboriginal people were eight times more likely than non-Aboriginal people to be victims of violence.³⁶ For Aboriginal women the position is disturbing; they are 45 times more likely than non-Aboriginal women to be victims of family violence by spouses or partners.³⁷ They are victims of violence and sexual offending at a rate 'unheard of in the rest of Australia'.³⁸ Aboriginal children are also more likely to suffer abuse than non-Aboriginal children.³⁹

26. Statistics provided by the Department of Justice indicated that from early 2004 the general rate of imprisonment was increasing and although there was a decline in May 2005 it appears to again be on the rise: see Department of Justice, *Monthly Graphical Report* (October 2005) 2. See also Parole Board of Western Australia, *Annual Report* (June 2005) 11.
27. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 137.
28. *Young Offenders Act 1994* (WA) Pt 5, Div 1 and 2.
29. Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 104, 108; Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 297; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 174; Luke C & Cunneen C, 'Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System' (1996) 1 *Australian Indigenous Law Reporter* 95.
30. Loh N & Ferrante A, *Aboriginal Involvement in the Western Australian Criminal Justice System: A statistical review, 2001* (Department of Indigenous Affairs, 2003) 13.
31. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 50, 116.
32. Loh N & Ferrante A, *Aboriginal Involvement in the Western Australian Criminal Justice System: A statistical review, 2001* (Department of Indigenous Affairs, 2003) 11.
33. It has been acknowledged that Aboriginal juveniles come into contact with the criminal justice system at a much earlier age than non-Aboriginal juveniles. See Joint Committee of Public Accounts and Audit, 'Indigenous Law and Justice Inquiry', *Hansard*, 31 March 2005, PA 29.
34. *Young Offenders Act 1994* (WA) s 189.
35. Walker J & McDonald D, 'The Over-Representation of Indigenous People in Custody in Australia' (1995) 47 *Trends and Issues in Crime and Criminal Justice* 2.
36. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 16.
37. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 47. See also discussion under Part VII 'Family Violence in Western Australian Indigenous Communities', below pp 349–51.
38. Payne S, 'Aboriginal Women and the Law' in Eastaile P & McKillop S (eds), *Women and the Law*, Australian Institute of Criminology Conference Proceedings No 16 (1993) 68.
39. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 46.

[There is a] need to ensure that Aboriginal women and children are protected from violence and that [they] have an equal voice in matters concerning the criminal justice system.

Aboriginal women

Aboriginal women constitute about half of all female prisoners in Western Australia.⁴⁰ It has been observed that, in addition, Aboriginal women suffer indirectly as the 'wives, mothers and sisters' of the vast number of Aboriginal men and children in custody.⁴¹ Despite the increasing involvement of Aboriginal women in the criminal justice system:

Aboriginal women remain largely invisible to policy makers and program designers with very little attention devoted to their specific situation and needs. This is of critical importance, particularly because of the impact that imprisonment has on Indigenous families and communities (especially through separation from children).⁴²

As observed by the Inspector of Custodial Services, both Aboriginal women prisoners and Aboriginal female detainees are 'marginalised, under resourced, made to fit into male routines and priorities'.⁴³ When making



proposals the Commission is mindful of the need to ensure that Aboriginal women and children are protected from violence and that Aboriginal women have an equal voice in matters concerning the criminal justice system.

Causes of Over-representation in the Criminal Justice System

Offending behaviour

It is sometimes assumed that the *only* reason Aboriginal people are over-represented is because they commit more offences. However, 'crime statistics do not measure the incidence of criminal conduct as such, but rather who gets apprehended and punished for it, which is a very different thing'.⁴⁴ For the purpose of illustration, from July 2004 until June 2005 there were 26,813 home burglary offences reported to the police. Of these, approximately 17 percent were 'cleared-up' or solved.⁴⁵ While it may be the case that Aboriginal people are over-represented in 17 per cent of burglary offences, the level of involvement in the remaining 83 percent of reported home burglary offences is unknown. There are some offences that have a higher clearance rate, such as homicide, sexual assault and other violent offences.⁴⁶ For some of these categories it may be true that Aboriginal people commit more offences in some locations.⁴⁷

Even if it could be assumed that Aboriginal people commit more offences than non-Aboriginal people, higher rates of offending do not explain differences between jurisdictions in Australia. As stated by Morgan and Motteram:

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40. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 1.
41. Payne S, 'Aboriginal Women and the Law' in Eastaile P & McKillop S (eds), *Women and the Law*, Australian Institute of Criminology Conference Proceedings No 16 (1993) 68.
42. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Social Justice Report 2001* (2002) 15.
43. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (August 2005) viii.
44. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245.
45. Western Australian Police Service, *Monthly Reported Crime Statistics: 2004/05* (2005) 1.
46. Ibid.
47. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245.

[U]nless one espouses the absurd notion that Aboriginal Western Australians are many times more evil than their inter-state colleagues, this cannot explain why Western Australia's Aboriginal imprisonment rate is so much higher than the rest of the country.⁴⁸

Although it is impossible to quantify, the Commission is of the view that a degree of structural bias within the Western Australian criminal justice system must account, at least in part, for the disproportionate rate of Aboriginal arrests, imprisonment and detention.⁴⁹

Underlying factors

The RCIADIC classified the causes of over-representation into two broad categories: underlying causes and issues within the criminal justice system (the latter is discussed below).⁵⁰ Underlying causes encompass both historical factors and contemporary socio-economic disadvantages. It has been stated that

much of the contact of Aboriginal people with the criminal law can be traced to their dispossession and the breakdown of their culture.⁵¹

The effects of the forced removal of Aboriginal children from their families and the institutionalisation that followed have been identified as a major cause of the high rate of involvement of Aboriginal people in the criminal justice system.⁵² Some commentators have stressed that socio-economic disadvantages (such as poverty and lack of education and employment opportunities) are the main reasons for this over-representation.⁵³ In addition, homelessness, family violence and substance abuse contribute to the offending behaviour of Aboriginal people.⁵⁴

The Commission acknowledges that there are numerous and complex underlying factors that contribute to high rates of Aboriginal offending and imprisonment. Many of the disadvantages faced by Aboriginal Western Australians have been considered earlier in this Discussion Paper.⁵⁵ The focus in this section is on issues within the criminal justice system; however, any significant reduction in the high rates Aboriginal imprisonment and detention will only be achieved through a comprehensive reform agenda, which includes improvements to the criminal justice system and reforms that focus on the underlying issues such as employment, education, housing, substance abuse and the 'strengthening of Indigenous cultural and family life'.⁵⁶

Issues within the criminal justice system

One factor that supports the notion of structural bias is that the level of Aboriginal over-representation increases at each progressive stage of the criminal justice system.⁵⁷ The proportion of Aboriginal people that are dealt with in the courts is less than the proportion of Aboriginal people that are sentenced to imprisonment or detention. For example, in 2003 in Western Australia between 17 and 26 per cent of people dealt with by adult courts were Aboriginal.⁵⁸ However, Aboriginal people constituted over 36 percent of all adult prisoners in 2003. Similarly, about a third of the juveniles dealt with in the Children's Court are Aboriginal but Aboriginal juveniles account for about 70 to 80 per cent of all juveniles in detention.⁵⁹

It has been argued that the increasing level of over-representation the further one goes into the criminal

48. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 135.
49. According to the Mahoney Inquiry, the Department of Justice has acknowledged that systemic discrimination is one cause of the high rates of Indigenous over-representation: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24]. It should be noted that, because of the proximity of the release of the Mahoney Inquiry to the finalisation of this Discussion Paper, the Commission has not had the opportunity to consider the recommendations and implications of the Mahoney Inquiry in detail.
50. Cunneen C & McDonald D, 'Indigenous Imprisonment in Australia: An unresolved human rights issue' (1997) 3(2) *Australian Journal of Human Rights* 90, 90.
51. *Welsh* (Unreported, Supreme Court of New South Wales, Hidden J, 14 November 1997) as quoted in Nicolson J 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 86.
52. Payne S, 'Aboriginal Women and the Law' in Eastaer P & McKillop S (eds.) *Women and the Law*, Australian Institute of Criminology Conference Proceedings No 16 (1993) 66.
53. Walker J & McDonald D, 'The Over-Representation of Indigenous People in Custody in Australia' (1995) 47 *Trends and Issues in Crime and Criminal Justice*, 6.
54. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 10.
55. See discussion under Part II 'Issues Affecting Aboriginal Communities in Western Australia', above pp 20–42.
56. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 176.
57. Luke G & Cunneen C, *Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System* (Sydney: Juvenile Justice Advisory Council, 1995) as referred to in Weatherburn D, Fitzgerald J & Hua J, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65, 66.
58. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 65, 75. The Commission notes that 17 per cent of all adults dealt with in the Magistrates Courts were Aboriginal and 26 per cent of all adults dealt with in the superior courts were Aboriginal. Thus the percentage of Aboriginal adults dealt with by all adult courts is somewhere between 17 and 26 per cent.
59. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 1.

justice system can be explained by higher rates of more serious offending. Weatherburn et al contend that structural bias by police in over-charging Aboriginal people for offensive behaviour and alcohol-related offences cannot be the cause of high imprisonment rates because those types of offences do not generally attract custodial penalties.⁶⁰ However, this argument fails to acknowledge the cumulative effect of discriminatory practices. While an arrest for a charge of offensive behaviour may not directly lead to imprisonment it becomes part of that person's antecedents for all future court appearances and dealings with the police. As stated by Morgan and Motteram 'compounding/cumulative' factors should not be

underestimated. Less access to diversion leads to earlier entry to the formal criminal justice system; less access to specialist courts leads to incarceration; incarceration leads to cultural dislocation; and lack of programs causes delayed release and increased chances of re-offending.⁶¹

The argument that Aboriginal people are only disproportionately imprisoned for very serious offences cannot be sustained. The Crime Research Centre reported that in 2003 Aboriginal people constituted over half of all prison receivals for good order offences and 61.5 per cent of driving and traffic related offences.⁶² This has been acknowledged by the Minister for Justice, John D'Orazio, who has been reported as saying that the Department of Justice is currently considering alternatives (in consultation with Aboriginal communities) to imprisonment for minor offences, such as driving without a licence.⁶³

A number of specific problems encountered by Aboriginal people within the criminal justice system are discussed immediately below. The topics of bail, sentencing, defences, procedure, police and prisons warrant separate and detailed discussion.⁶⁴

Problems Experienced by Aboriginal People in the Criminal Justice System

Alienation from the Criminal Justice System

Aboriginal people feel alienated from the criminal justice system.⁶⁵ One of the reasons is the history of relations between criminal justice agencies and Aboriginal people. As one Aboriginal commentator has stated:

When I think of the legal system, I think of it as an enemy. It is not there for my benefit. It has imposed gross injustices on my people and crushed my people's way of life.⁶⁶

Other reasons stem from language, cultural and communication barriers which impact upon police questioning as well as the court process itself.⁶⁷ During the consultations the Commission heard from many Aboriginal people that the language used in court makes no sense to them.⁶⁸ A study of traditional Aboriginal prisoners in Western Australia observed that the failure to understand what is happening in court causes the criminal justice process to lose meaning and is therefore less likely to change future behaviour.⁶⁹ An Aboriginal person from the Northern Territory stated that, 'Dealing with whitefella law is like falling into a big, black hole and you can't get out'.⁷⁰

Differences between Aboriginal customary law methods for resolving disputes and those of the western criminal justice system also contribute to this sense of alienation. Although customary law processes are not necessarily immediate, once completed (because the purpose is the restoration of peace) the matter is at an end. Aboriginal people stated that they do not understand why the court process takes so long.⁷¹ In Albany it

60. Weatherburn D, Fitzgerald J & Hua J, 'Reducing Aboriginal Over-Representation in Prison' (2003) 62(3) *Australian Journal of Public Administration* 65, 67.

61. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 136.

62. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 141. The Commission notes that the Mahoney Inquiry observed that Aboriginal people generally commit less serious crimes than non-Aboriginal people: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.27].

63. Spagnolo J, 'Action on Aborigine Jail Crisis', *The Sunday Times*, 20 November 2005, 31.

64. See individual sections of this Part and also see Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

65. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 239.

66. Frankland R, 'Mr Neal is Entitled to Be an Agitator: Indigenous people put upon their country' in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The cultural politics of juries in Australia* (Perth: University of Western Australia, 2004) 52.

67. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 246. See also Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

68. LRCWA, *Thematic Summaries of Consultations – Casuarina Prison*, 23 July 2003, 6; *Bunbury*, 28–29 October 2003, 9; *Albany*, 18 November 2003, 19.

69. Duckworth A, Foley-Jones C, Lowe P & Maller M, 'Imprisonment of Aborigines in North Western Australia' (1982) 15 *Australian and New Zealand Criminal Law Journal* 26, 41.

70. The Law Society of the Northern Territory, *Indigenous Protocols for Lawyers in the Northern Territory* (2004) 2.

71. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 15; *Wiluna*, 27 August 2003, 22.

was explained that 'Aboriginal people do not understand the protracted European processes. Their own are quick and decisive'.⁷² Aboriginal people consulted also found it difficult to understand the effect of a prior criminal record. In Wuggubun it was said that a 'criminal record sticks, whereas once you have traditional punishment everyone is equal afterwards'.⁷³

Problems arising from language and communication barriers and the need for interpreters are dealt with below.⁷⁴ The general sense of alienation felt by Aboriginal people within the system can be improved by the establishment of Aboriginal courts;⁷⁵ the development of more effective cultural awareness training for those who work in the system; and greater involvement of Aboriginal people in justice issues.⁷⁶

Programs and Services

Aboriginal people have less access than non-Aboriginal people to services and programs within the criminal justice system.⁷⁷ Consequently, Aboriginal people are disadvantaged: they have fewer opportunities for rehabilitation and are therefore more likely to re-offend and come into contact with the justice system again. Aboriginal people are also disadvantaged in terms of diversionary options. Mainstream court programs that aim to divert offenders from imprisonment, such as drug courts and family violence courts, have been largely unsuccessful for Aboriginal people.⁷⁸ The lack of culturally appropriate programs and services in prisons, particularly in regional areas, causes delay in being released on parole. Aboriginal prisoners have to wait or be relocated to participate in the few programs that

are available.⁷⁹ During the Commission's consultations it was stated that:

Programs have to be devised for Aboriginal people. As there is no consultation with Aboriginal people it is not surprising that they are not culturally appropriate.⁸⁰

The Commission supports the establishment of Aboriginal community justice mechanisms and their involvement in crime prevention, diversionary and rehabilitative programs.⁸¹

Mandatory Sentencing

In 1996 the Western Australian government introduced mandatory sentencing laws for offences of home burglary (commonly known as the 'three-strikes' laws).⁸² The effect of these laws is that an adult offender who is convicted of burglary (on a place ordinarily used for human habitation) and who has two relevant prior convictions of home burglary must be sentenced to 12 months' imprisonment. For a juvenile the sentence must either be 12 months' detention or a 12-month conditional release order.⁸³

The mandatory sentencing laws in Western Australia have been subject to extensive criticism, especially in relation to the discriminatory impact upon Aboriginal youth. Although the laws apply to all people (and therefore appear to be neutral) Aboriginal children constitute approximately 80 per cent of all juveniles dealt with under the laws.⁸⁴ In regional areas (where there are no juvenile detention facilities) this figure escalates to 90 per cent. Young Aboriginal people from regional locations who are sentenced to detention are

72. LRCWA, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 14.

73. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.

74. See Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

75. See discussion under 'Aboriginal Courts', below pp 142–57.

76. See discussion below under 'Aboriginal Community Justice Mechanisms', below pp 107–42; 'Cultural Awareness Training', below p 104; and 'Lack of Involvement of Aboriginal People in the Administration of Criminal Justice', below pp 104–105.

77. This problem has also been observed by the Office of the Inspector of Custodial Services: see, for example, Office of the Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005) 119. For a detailed discussion of the programs and services that are available see Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004). See also discussion under 'Sentencing Options', below pp 224–30 and 'Prisons', below pp 255–62.

78. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 32. The Commission notes the one exception to this is the Geraldton Alternative Sentencing Regime: see discussion under 'Aboriginal Courts – Geraldton Alternative Sentencing Regime', below p 148.

79. Parole Board of Western Australia, *Annual Report* (June 2005) 8, 11.

80. LRCWA, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 10.

81. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.

82. *Criminal Code Amendment Act (No 2) 1996* (WA).

83. A conditional release order is a sentence of detention with immediate release subject to conditions. Failure to comply with conditions may result in an order that the offender serve the period of detention set in the original order. See *Young Offenders Act 1994* (WA) s 114. For an outline of the laws, see Morgan N, Blagg H & Williams V, *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* (Perth: Aboriginal Justice Council, December 2001) 12.

84. Department of Justice, *Review of Section 401 of the Criminal Code* (2001) 24–25. Another example of a law or policy that appears to be neutral is the Northbridge curfew. Although it applies to all children, 90 per cent of those removed are Aboriginal youth: see Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (September 2005) 14. For a discussion of the discriminatory impact on Aboriginal youth of the Western Australian Northbridge curfew policy, see Koch T, 'Curfews: Aboriginal Legal Service of Western Australia' (2003) 5(27) *Indigenous Law Bulletin* 7.

taken from their families, communities and culture and must spend at least six months in a detention centre in Perth.⁸⁵ While Aboriginal children may commit more home burglary offences than non-Aboriginal children, part of the reason for the high numbers of Aboriginal children caught by the laws is that they have less access to diversionary options.⁸⁶ For the purposes of the 'three-strikes' laws a caution by police or a referral to a juvenile justice team does not count as a relevant prior conviction.

Despite the various inquiries and reports that have criticised the mandatory sentencing laws in Western Australia and the Northern Territory, the 'three-strikes' laws in Western Australia remain in force.⁸⁷ During the Commission's consultations for this project Aboriginal people were still expressing their concern over the discriminatory impact of the laws on young Aboriginal people.⁸⁸ In Mirrabooka it was stated that mandatory sentencing 'must be abolished'.⁸⁹ It is now well accepted that the mandatory sentencing laws have not reduced the rate of home burglary in Western Australia.⁹⁰ It has also been observed that, irrespective of the three-strikes laws adults would nearly always receive a sentence of more than 12 months' imprisonment for a third burglary conviction. Similarly, a large proportion of juveniles (especially those with a significant record of convictions) would also inevitably receive a sentence of detention.⁹¹ Therefore, the negative impact of the laws is felt by those offenders whose circumstances call for leniency.

Diversionary sentencing options, such as those that may be developed by Aboriginal communities in conjunction with an Aboriginal court, will not reach those offenders who fall within the 'three-strikes laws'. The Department of Justice's review of the mandatory sentencing laws acknowledged this same issue with respect to the operation of the Drug Court. Adults

who had accumulated two prior convictions for home burglary were often drug abusers and because of the mandatory sentencing laws they were not able to engage in drug rehabilitation.⁹²

Mandatory sentencing prevents a court from taking into account any relevant aspects of customary law in mitigation. The ALRC recommended that there should be a legislative exception to mandatory sentencing laws for homicide so that Aboriginal customary law can be taken into account.⁹³ The Commission has recognised the importance of Aboriginal community justice mechanisms and made a proposal in relation to community justice groups.⁹⁴ Any Aboriginal community processes, based on customary law or otherwise, to deal with young Aboriginal offenders will be impeded by mandatory sentencing laws. The Commission is of the view that the mandatory sentencing laws should be abolished. The laws are unjust and unprincipled and there is no evidence to suggest that they are effective in reducing crime. Further, as suggested by the former Aboriginal Justice Council, the laws should be repealed as a 'gesture of commitment to Indigenous concerns'.⁹⁵

Proposal 6

That the mandatory sentencing laws for home burglary in Western Australia be repealed.

Legal Representation

Due to the alienation from the justice system felt by Aboriginal people adequate legal representation is essential. For many Aboriginal people their first contact with the system is with police and that experience is rarely perceived as positive. The next point of contact may be with a legal representative. If cultural differences are not recognised at this point, serious injustices may

85. For a detailed discussion of the impact of the laws on Aboriginal children and a selection of case studies, see Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 63–72.
86. Morgan N, 'Going Overboard? Debates and Developments in Mandatory Sentencing, June 2000 to June 2002' (2002) 26 *Criminal Law Journal* 293, 310.
87. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 2000* (Commonwealth Parliament, 2000); Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (Commonwealth Parliament, 2002); Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001). The Commission notes that the Northern Territory laws were repealed in 2001.
88. LRCWA, *Thematic Summaries of Consultations – Mirrabooka* 18 November 2002, 8; *Pilbara*, 6–11 April 2003, 15.
89. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 11.
90. Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing for Property Offences) Bill 2000* (Commonwealth Parliament, 2002) 21.
91. *Ibid* 13; Department of Justice, *Review of Section 401 of the Criminal Code* (2001) 21, 25.
92. Department of Justice, *ibid* 22.
93. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [522].
94. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.
95. Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001). The Commission notes that the Northern Territory laws were repealed in 2001: see Morgan, Blagg & Williams, 8.

result: a judicial officer will generally assume that because an accused is legally represented all relevant issues will have been considered. It has been stated that:

The issue of the adequacy of legal representation for Indigenous people goes to the heart of questions of access, equity and the rule of law. It represents the ability of Indigenous people to use the legal system (both criminal and civil) to a level enjoyed by other Australians.⁹⁶

In Western Australia Aboriginal people are most often legally represented by the Aboriginal Legal Service of Western Australia (ALS). Some are represented by the Legal Aid Commission of Western Australia (LAC), community legal centres, private lawyers and smaller Indigenous-specific providers such as Family Violence Prevention Legal Services.⁹⁷

During the Commission's consultations, Aboriginal people identified problems with legal representation. Some suggested that lawyers persuade people to plead guilty.⁹⁸ The need for adequate funding of the ALS was also recognised.⁹⁹ In Rockingham it was stated that:

The ALS always seem to be too busy – lack of services to the 'black-man' – they are all white [staff] and why aren't the [ALS] employing Aboriginal people to do these jobs? ¹⁰⁰

Funding levels to Aboriginal and Torres Strait Islander Legal Services (ATSILS), Australia-wide, 'provide a cheap form of legal representation for Indigenous people'.¹⁰¹ In a recent inquiry it was recognised that ATSILS operate in a climate of static funding and increasing demand'.¹⁰² The inquiry also observed that ATSILS find it difficult to attract and retain experienced staff because remuneration levels are much less than those received by staff in the LAC.¹⁰³ This is yet another

example of structural bias within the system. It was recommended that the Commonwealth Attorney-General's department develop a comparative scale of remuneration between ATSILS and LAC.¹⁰⁴ The inquiry supported increased funding, particularly for family and civil law, to Indigenous-specific services dealing with family violence in order to improve access to legal services for Aboriginal women. It was not suggested that there should be gender-specific services because this would disadvantage women who should have access to the experience of ATSILS in dealing with criminal justice issues.¹⁰⁵

In the past, it has been noted that Aboriginal accused are less likely to obtain the services of a lawyer despite the existence of Aboriginal legal services.¹⁰⁶ This is particularly relevant in remote Western Australian locations where ALS representatives may not always be present. The Commission understands that the Department of Justice is currently considering the development of a management plan for self-represented persons in all areas of the legal system, including criminal justice.¹⁰⁷ Although the details of such a plan are not yet known, the Commission supports this development in principle.

Circuit or 'bush courts' (when a magistrate, prosecutor and ALS lawyer intermittently attend an Aboriginal community to hear cases over one day) are well-known for their difficulties.¹⁰⁸ In many places Aboriginal people do not speak English as a first language and there are inadequate interpreter services.¹⁰⁹ Natalie Siegel, after researching bush courts in the Northern Territory and Western Australia, concluded that excessively long lists (more problematic in the Northern Territory than Western Australia) and inadequate time to take appropriate instructions were serious impediments to proper legal representation for Aboriginal people from

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96. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 52.
97. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services* Report No 403 (Canberra, 2005) 1–2.
98. LRCWA, *Thematic Summaries of Consultations – Rockingham*, 9 December 2002, 32; *Midland*, 16 December 2002, 36; *Bandyup Prison*, 17 July 2003, 3; *Broome* 17–19 August 2003, 29; *Albany*, 18 November 2003, 19; *Albany Prison*, 18 November 2003, 3.
99. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 10; *Broome*, 17–19 August 2003, 30.
100. LRCWA, *Thematic Summaries of Consultations – Rockingham*, 9 December 2002, 32.
101. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 51.
102. Joint Committee of Public Accounts and Audit, *Access of Indigenous Australians to Law and Justice Services*, Report No 403 (2005) 17.
103. *Ibid* 40–44.
104. *Ibid* 52.
105. *Ibid* 37–38.
106. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co Ltd, 1991) 231, 242.
107. Letter to the LRCWA from Mr Ray Warnes, Acting Executive Director Court Services, Department of Justice, 28 February 2005.
108. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 268. The Commission notes the recommendation of the Kimberley Aboriginal Reference Group that there should be a second Magistrate in the Kimberley: see Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 8.
109. For a detailed discussion on Aboriginal language interpreters, see Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–406.

remote communities.¹¹⁰ In *Putti v Simpson*¹¹¹ Muirhead J stated that:

The practice of appearing with only hurriedly-gained instructions, especially where language or cultural differences jeopardise understanding, may result in substantial injustice to individuals.¹¹²

Siegel notes that, due to language and cultural barriers, inadequate time for taking instructions may result in the accused entering the wrong plea; that is, pleading guilty in circumstances where the accused may have a defence to the charge.¹¹³ A further complication is that there is no time to properly explain to the client what has transpired during the court proceedings and accordingly the accused may leave the court with little or no understanding of his or her obligations. In one Northern Territory location it was reported that a young Aboriginal girl, who was the first person to be dealt with by the court, was still present at the court precincts at 4.00 pm because she did not know that she was free to leave.¹¹⁴

Suggestions for improvements in legal representation were made by Aboriginal people during the Commission's consultations. In Kalgoorlie it was suggested that there should be 'protocols to guide lawyers in their dealings with Aboriginal clients'.¹¹⁵ In Broome it was stated that lawyers need to know more about traditional law to avoid being misled.¹¹⁶ In 2004 the Law Society of the Northern Territory developed protocols for dealing with Indigenous people. The underlying theme of these protocols is to avoid problems arising from miscommunication between non-Indigenous lawyers and their Indigenous clients. There are three main protocols: a test to determine whether the client requires the services of an interpreter; an obligation on the lawyers to fully explain their role; and a requirement to use plain English. The protocols also contain information about cultural differences and aspects of Aboriginal customary law. The Law Society of Western Australia is in the process of adapting these protocols for use in this state.¹¹⁷ The Commission supports this approach. The protocols could be used

not only by the ALS but also LAC, community legal centres and private practitioners.

Lawyers employed by the Director of Public Prosecutions (DPP) should also be aware of Aboriginal cultural issues. Prosecutors are at times required to examine Aboriginal witnesses and therefore they must be sensitive to any language, communication or cultural issues that may impact upon the person's understanding of the process. Prosecutors may also be required to object to unfair or inappropriate questions put to an Aboriginal witness during cross-examination. The protocols, discussed above, could therefore also be used by the DPP.

The Commission is of the view that in addition to the development of protocols, lawyers who regularly work with Aboriginal people should undertake cultural awareness training, preferably presented by Aboriginal people. A cultural awareness program could be incorporated into the Articles Training Program. Of course, this would only reach people who had recently graduated from their law degree. Therefore, the Commission encourages all lawyers who regularly work with Aboriginal people to undertake cultural awareness training. The Commission is of the view that with adequate resources, the Law Society of Western Australia would be the most appropriate organisation to coordinate cultural awareness training programs for legal practitioners.

Proposal 7

That the Western Australian government provide adequate resources for the development of cultural awareness training programs for legal practitioners.

Cultural Awareness Training

The need for more effective cultural awareness training for all who work in the criminal justice system was a consistent theme of the Commission's consultations with Aboriginal communities.¹¹⁸ In relation to sentencing

110. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268. See also Siegel N, 'Bush Courts of Remote Australia' (2002) 76 *Australian Law Journal* 640, 644.

111. (1975) 6 ALR 47.

112. Ibid 50–51.

113. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 273.

114. Ibid 277.

115. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27.

116. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.

117. Telephone communication with Alison Gaines, Executive Director of the Law Society of Western Australia, 6 October 2005. See also discussion under Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–406.

118. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 9; *Geraldton* 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 21–22; *Bunbury*, 28–29 October 2003, 11; *Albany* 18 November 2003, 19. Because of the differences between Aboriginal communities the focus was on localised training.

the Commission emphasises the need to consider Aboriginal customary law in its broadest sense. Judicial recognition of customary law by criminal courts in this state has been largely limited to issues of physical traditional punishment.¹¹⁹ More effective cultural awareness training will assist in a greater understanding of all relevant customary law issues. The Commission has made separate proposals in relation to cultural awareness training for judicial officers, police and lawyers.¹²⁰

The Commission understands that many (but not all) employees of the Department of Justice participate in cultural awareness training.¹²¹ The Gordon Inquiry observed that volunteer workers for the Victim Support Service and the Child Witness Service did not receive any cultural awareness training.¹²² In addition to proposing that cultural awareness training should be available for all volunteer workers in these services, it was also recommend that Department of Justice staff who work in regional areas should undergo specific training relevant to that region.¹²³



Proposal 8

That employees of the Department of Justice who work directly with Aboriginal people (such as community corrections officers, prison officers and court staff) be required to undertake cultural awareness training.

That cultural awareness training be made available to volunteer workers.

That cultural awareness training be specific to local Aboriginal communities and include programs presented by Aboriginal people.

Lack of Involvement of Aboriginal People in the Administration of Criminal Justice

The lack of Aboriginal people working in the criminal justice system contributes to the sense of alienation and lack of understanding of the process. The Commission's consultations supported increased Aboriginal employment within government justice agencies.¹²⁴ In particular there was strong support for more Aboriginal justices of the peace and more Aboriginal judges and magistrates.¹²⁵ The Kimberley Aboriginal Reference Group has recently published its recommendations to the Department of Justice for the Kimberley Custodial Plan. This group found that many Aboriginal people in the Kimberley were eager to become more involved in the administration of justice.¹²⁶

The Commission supports the Department of Justice's *Aboriginal Employment Strategy (2004–2008)* which is designed to increase the number of Aboriginal people employed within the Department.¹²⁷ However, as argued by Morgan and Motteram one of the reasons for the difficulty in recruiting Aboriginal staff is the

119. See discussion under 'Aboriginal Customary Law and Sentencing', below p 212–20.

120. See discussion under 'Police – Cultural Awareness Training', below p 252 and Part IX 'Cultural Awareness Training for Judicial Officers', below pp 415–16. The Commission notes that the Office of the Inspector of Custodial Services has recommended that the current prison officer training program be reassessed and that Aboriginal cultural awareness training will likely be included in the new program. See Office of the Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005) ch 8.

121. Correspondence by email with Carmel Musca, HR Consultant, Learning and Development, Department of Justice, 21 November 2005.

122. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 489.

123. Ibid 490.

124. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie* 25 March 2003, 25; *Albany* 18 November 2003, 15.

125. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 12; *Manguri*, 4 November 2002, 5; *Midland*, 16 December 2002, 37; *Laverton*, 6 March 2003, 14; *Geraldton* 26–27 May 2003, 15, 16.

126. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 7.

127. The Commission notes that this policy is now referred to as the *Aboriginal Employment Strategy (2005–2010)* and that the Mahoney inquiry recommended that the Department should give effect to this strategy as a matter of policy at the highest level: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.24].

simple fact that many Aboriginal people are unwilling to work in a system with which they or their families have experienced negative contacts – a perception that is not eased by spiralling Aboriginal imprisonment rates.¹²⁸

The establishment of Aboriginal courts and circle sentencing throughout Australia has provided one mechanism for increasing the participation of Aboriginal people in the criminal justice system.¹²⁹ In Victoria there is also a program recruiting Indigenous people to act as bail justices to hear applications for bail.¹³⁰ This program was developed as part of a commitment to increase Indigenous participation in the Victorian criminal justice system.

In the following section, the Commission proposes the establishment of community justice groups in Aboriginal communities throughout Western Australia. One important role for these groups is to be actively involved in criminal justice issues such as diversion, crime prevention, sentencing options and providing information to courts. The fact that members of a community justice group will be accountable to their community will provide a greater incentive for Aboriginal people to become involved in justice issues.¹³¹

Traffic Offences and Related Matters

Aboriginal people are disproportionately represented in custody for traffic offences. In 2003 Aboriginal prisoners accounted for 61.5 per cent of all prison receptions for motor vehicle and driving offences.¹³² Aboriginal people are also significantly over-represented in drivers licence suspension orders that result from fine default.¹³³ In a recent study it was recommended that the appropriateness of fines for Aboriginal people should be immediately reviewed and that culturally

appropriate sanctions should be considered.¹³⁴ The Commission has acknowledged that further research is needed in relation to the imposition of fines on Aboriginal people and has made proposals for more culturally appropriate sanctions.¹³⁵

During its Pilbara consultations the Commission was told that in remote locations when Aboriginal people are travelling to their law grounds police wait by the roadside with the intention of conducting vehicle and licence checks.¹³⁶ Similarly, it was stated that police target Aboriginal people in the same way when they are travelling to a funeral. Aboriginal people are then apprehended and are not able to attend the funeral. It was stated that there is 'no respect for Aboriginal law'.¹³⁷

In remote communities where there is no public transport, Aboriginal people will drive for the purposes of court attendance, appearance at customary law ceremonies or for the purpose of medical treatment.¹³⁸ Cultural obligations may also require an Aboriginal person to transport another for these purposes. It has been observed that it may constitute a breach of customary law to refuse a request to drive another person, if that person stands in a special relationship to the driver.¹³⁹ The Kimberley Aboriginal Reference Group has suggested that the system for obtaining drivers licences should be reviewed in terms of its suitability to remote conditions.¹⁴⁰

Pursuant to s 76 of the *Road Traffic Act 1976* (WA) a person who has been disqualified from holding or obtaining a drivers licence may apply to a court for an extraordinary drivers licence. In all cases there is a time period that must expire before the person can make an application. The amount of time depends upon the nature of the offence that led to the disqualification.¹⁴¹ If granted, an extraordinary drivers licence will allow

128. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 22, 106.

129. See discussion under 'Aboriginal Courts', below pp 142–57.

130. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 59. There are about 19 Indigenous bail justices in Victoria.

131. See discussion under 'The Commission's Proposal for Community Justice Groups', below pp 133–41.

132. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 141. This was also referred to in Mahoney Inquiry: see Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.31]

133. Ferrante A, *The Disqualified Driver Study: A study of factors relevant to the use of licence disqualification as an effective legal sanction in Western Australia* (Perth: Crime Research Centre, 2005) 70.

134. *Ibid.*

135. See discussion under 'Sentencing Options', below pp 224–30.

136. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 14.

137. *Ibid.* 13.

138. *Ibid.*

139. Siegel N, 'Is White Justice Delivery in Black Communities by "Bush Court" a Factor in Aboriginal Over-representation Within our Legal System?' (2002) 28 *Monash University Law Review* 268, 289.

140. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 10.

141. *Road Traffic Act 1976* (WA) s 76(1)(a).



the person to drive subject to specific conditions imposed by the court. Conditions may relate to the purpose of driving, the hours that the person is permitted to drive and the place or road on which the person is entitled to drive.¹⁴²

When deciding whether to grant an extraordinary licence the court is required to consider the safety of the public, the character of the applicant, the nature of the offences which led to the disqualification and the applicant's conduct since the licence was disqualified. In addition the court must take into account the 'degree of hardship and inconvenience which would otherwise result to the applicant and his family'¹⁴³ if an extraordinary licence was not granted.

In the case of a special application (made within one to two months of a disqualification for certain offences related to drink driving or refusing to comply with the requirements of a breath-test) the court can only grant an extraordinary licence if satisfied that the applicant will suffer extreme hardship.¹⁴⁴ Extreme hardship is limited to medical treatment for the applicant or his or her family or for the purposes of employment.¹⁴⁵ The Commission is of the view that the relevant criteria for deciding whether to grant an extraordinary drivers licence should be extended to take into account Aboriginal kinship and cultural and customary law obligations. This would allow a respected member of an Aboriginal community (or a member of a community justice group) to apply for an extraordinary drivers licence for the purpose of transporting community members to court or to funerals, or when someone is in need of urgent medical treatment.

Proposal 9

That the relevant criteria for an application for an extraordinary drivers licence as set out in s 76 of the *Road Traffic Act 1976* (WA) be amended to include:

- That where there are no other feasible transport options, Aboriginal customary law obligations be taken into account when determining the degree of hardship and inconvenience which would otherwise result to the applicant, the applicant's family or a member of the applicant's community.
- In making its decision whether to grant an extraordinary drivers licence the court should be required to consider the cultural obligations under Aboriginal customary law to attend funerals and the need to assist others to travel to and from a court as required by a bail undertaking or other order of the court.

Under the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) a person is not entitled to apply for an extraordinary drivers licence if his or her licence is suspended for unpaid fines.¹⁴⁶ Alternatively an application must be made to the registrar of the Fines Enforcement Registry for the licence suspension order to be cancelled. The grounds of the application are that the applicant requires a drivers licence for employment or needs urgent medical treatment (or a family member needs urgent medical treatment).¹⁴⁷ If the registrar grants the application the offender is required to pay the outstanding fine by instalments. The same criteria as outlined in the above proposal should also be included in the grounds upon which a person can apply to have their licence suspension cancelled.

Proposal 10

That the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) be amended to provide that an Aboriginal person may apply to the registrar of the Fines Enforcement Registry for the cancellation of a licence suspension order on the additional grounds that it would deprive the person or a member of his or her Aboriginal community of the means of obtaining urgent medical attention, travelling to a funeral or travelling to court.

142. *Road Traffic Act 1976* (WA) s 76(5).

143. *Road Traffic Act 1976* (WA) s 76 (3) (f).

144. *Road Traffic Act 1976* (WA) s 76(3)(a).

145. *Road Traffic Act 1976* (WA) s 76(3)(b).

146. *Road Traffic Act 1976* (WA) s 76(1)(aa).

147. *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 27A, 55A.

Aboriginal Community Justice Mechanisms

The Commission's consultations with Aboriginal people across the state revealed a strong desire for greater participation in the operation of the criminal justice system and recognition of traditional forms of dispute resolution. While the precise nature of that involvement differed from community to community, in general the Commission found:

[T]hat many Aboriginal people, particularly those in remote areas of the state, want to see official recognition given to Aboriginal forms of adjudication and punishment. However, more attention has been devoted to identifying ways in which Aboriginal values and principles can be incorporated into the non-Aboriginal justice system.¹

Part X discusses the enhancement of governance structures in Western Australian Aboriginal communities. This section examines governance issues from a criminal justice perspective. Former Aboriginal and Torres Strait Islander Social Justice Commissioner, Bill Jonas, has argued that 'community justice mechanisms are an integral component of Indigenous governance' and in order to improve the situation faced by Indigenous people they must 'be accompanied by a return of control and decision making processes to Indigenous communities'.²

This section considers the developments in this area in Western Australia and other states of Australia and sets out proposals for the establishment of community justice groups in Western Australia. It is intended that these groups will deal with justice issues at the community level as well as having a direct role within the formal criminal justice system. Closely linked to community justice mechanisms is the establishment of Aboriginal courts in many parts of Australia. The different models for Aboriginal courts³ and the Commission's proposals in relation to Aboriginal courts

in Western Australia are discussed in the following section.

For the purposes of this Discussion Paper, an Aboriginal community justice mechanism refers to any structure which has been established by an Aboriginal community or its members, with or without government assistance, to deal with social and criminal justice issues affecting Aboriginal people. Aboriginal courts refer to the different models that operate throughout Australia which involve the active participation of Aboriginal community members, usually Elders, during the court proceedings. The exact nature of that involvement differs from place to place.

Harry Blagg observed in his background paper to this reference that there have been a number of developments in Western Australia both in relation to community justice mechanisms and Aboriginal courts; however, these developments have been informal and dependent on specific individuals and the government policy at the time.⁴ The Commission acknowledges that a number of successful community justice initiatives already exist in Western Australia. The proposals set out below do not attempt to take away from these initiatives but aim to empower Aboriginal communities to increase their ability to determine their own justice issues and solutions and to recognise Aboriginal customary law processes for dealing with justice matters.

Previous Inquiries

A number of other inquiries and reports have considered Aboriginal community justice mechanisms. While some of these have specifically considered Aboriginal customary law, others have been directed at the disturbing over-representation of Aboriginal people in

1. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 8 (January 2005) 3.
2. Jonas W, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Community Justice, Law and Governance: A rights perspective* (Paper delivered at the Indigenous Governance Conference, Canberra, 3–5 April 2002) 2–3: see <http://www.hreoc.gov.au/speeches/social_justice/community_justice.html>.
3. The term 'Aboriginal court' is used throughout this section to refer to all of the various models in Australia, such as the Nunga court, Koori Court, Murri Court and circle sentencing courts.
4. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 1.

the criminal justice system as both offenders and victims; the lack of understanding of the way in which the criminal justice system operates; and the inadequacy of mainstream services to deal with many of the underlying issues. Some of the more important and relevant findings are set out below. Unless otherwise noted, the Commission generally supports the material contained in these reports and has taken their recommendations into account when formulating its own proposals in this area.

In its 1986 report on *The Recognition of Aboriginal Customary Laws*, the ALRC revealed a strong preference for community justice mechanisms⁵ that do not provide for a separate court structure. It supported the establishment of community justice mechanisms that have the power to deal with matters in a non-judicial manner and for greater involvement of these structures within the Australian legal system:

Proposals for local justice mechanisms which do not involve the exercise of judicial power but focus on mediation and conciliation and a greater voice for Aborigines in the existing criminal justice system pose fewer problems of implementation than proposals for 'Aboriginal courts'.⁶

In its extensive recommendations, the RCIADIC recognised the importance of consultation and partnerships between Aboriginal people and governments in developing initiatives within the criminal justice system. In particular, it was recommended that guidelines should be developed to ensure that the principle of self-determination is 'applied in the design and implementation of any policy or program or the substantial modification of any policy or program which will particularly affect Aboriginal people'.⁷ Where possible such programs should be provided for by appropriate Aboriginal organisations and where not possible

Aboriginal people should be employed by the agency which delivers the program.⁸ The RCIADIC also supported the involvement by Aboriginal communities in community policing⁹ and adequate funding to support community policing and justice initiatives at the local level.¹⁰ Similarly, the New South Wales Law Reform Commission in its report, *Sentencing Aboriginal Offenders*, considered the role of Aboriginal communities in sentencing and found that:

Facilitating participation by people in the design and delivery of services and institutions that affect them is a fundamental principle of democracy and equality before the law.¹¹

In its 2003 inquiry into Aboriginal customary law in the Northern Territory, the Northern Territory Law Reform Committee (NTLRC) recommended that Aboriginal communities should be assisted by government to develop 'law and justice plans which appropriately incorporate or recognise Aboriginal customary law as a method of dealing with issues of concern to the community or to assist or enhance the application of Australian law within the community'.¹² It was proposed that a particular Aboriginal community could apply to the Attorney-General for legal recognition of such Aboriginal customs and traditions as the community wished as long as those customs and traditions did not breach the general laws of the Northern Territory or universal human rights.¹³ The report did not contain details as to how these 'law and justice plans' would be established other than a general acknowledgement that they should be carefully designed, developed and adequately resourced.¹⁴ It also recommended a model allowing for community input into the sentencing of offenders.¹⁵ As part this recommendation it was

5. The ALRC used the term 'local justice mechanisms' rather than community justice mechanisms and suggested that they should be provided with administrative support and legislative backing such as a provision which allows courts to adjourn a matter for consideration by the local justice mechanism: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [833].
6. Ibid. In this context the ALRC used the term 'Aboriginal courts' to refer to Aboriginal controlled community courts rather than the current models of Aboriginal courts that operated within the framework of the Australian criminal justice system.
7. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [27.1.4] Recommendation 188 and [27.4.31] Recommendation 192. For a fuller discussion of the concept of self-determination at international law and its application in the Western Australian context: see Part X, below pp 419–38.
8. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [27.1.4] Recommendation 188 and [27.4.31] Recommendation 192.
9. Ibid [29.2.4] Recommendation 214.
10. Ibid [29.3.21] Recommendations 220 and 221.
11. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 108.
12. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 4. An earlier report of the NTLRC considered that alternative dispute resolution in Aboriginal communities could be enhanced through the development of community justice plans. As part of a community justice plan the community would be able to make by-laws covering both customary law offences and offences under Australian law; however, there were restrictions to the penalties that could be imposed. See NTLRC, *Report on Alternative Dispute Resolution in Aboriginal Communities*, Report No 17C (1997) 13–16. The Commission has considered the effectiveness of the existing Aboriginal community by-law scheme: see heading 'Review of the By-Law Scheme as it Relates to the Criminal Justice System', below pp 118–21.
13. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 20.
14. Ibid 21.
15. Ibid.

proposed that a Consultative Committee should be established on the following terms:

- An Aboriginal community could apply to the Attorney-General for approval of its Consultative Committee.
- The Consultative Committee would be entitled to appear in court whenever a member of that community is charged with an offence.
- In appropriate cases, the court may adjourn and refer the offender to the Consultative Committee for it to deal with the matter, as long as the offender had pleaded guilty and all relevant parties consented.
- No legal representation should be allowed when the person appears before the Consultative Committee; however, the offender would receive legal advice/representation before agreeing to be dealt with by the Consultative Committee.
- The Consultative Committee could use traditional punishments and procedures when dealing with the matter as long as they were not contrary to the general law.¹⁶

In his submission to the NTLRC inquiry into Aboriginal customary law, the Aboriginal and Torres Strait Islander Social Justice Commissioner considered a number of developments in relation to Indigenous community justice mechanisms and courts in Australia and internationally.¹⁷ The submission warned against the adoption of a 'one-size-fits-all' approach or 'the top-down application of a preconceived model' in formulating solutions to Aboriginal law and justice issues.¹⁸ Further, it was contended that any proposal should be developed with the 'full participation of Aboriginal people' and must have the ability to adapt to the needs of individual communities with a focus on capacity building, governance reform and service delivery.¹⁹

The Commission notes that its proposal for community justice groups may, at first glance, be conceived by some to be a 'top-down application' of a 'one-size-fits-all model'. However, the flexibility of the proposal described below²⁰ and the requirement for additional consultation with individual communities ensures that the practical implementation of the proposal will be based on the views of those communities who wish to establish a community justice group.

Community Justice Mechanisms: Western Australia

Although several examples of Aboriginal community justice mechanisms already exist in Western Australia, there is no formal recognition of their status and consequently no provision for them to operate within the criminal justice system. The state government's policy is clearly to work in partnership with Aboriginal people and to achieve local solutions with as much input from Aboriginal people as possible.²¹ This section of the Discussion Paper considers examples of initiatives in Western Australia and relevant government policy, plans and agreements for the purposes of illustrating the current position and for the better understanding of the need for reform.

Many communities consulted by the Commission showed support for Aboriginal community justice mechanisms.²² In Wiluna the benefits of existing community justice mechanisms such as the Social Justice Committee, Ganah Ganah Night Patrol and the Sobering-Up Shelter were acknowledged.²³ Similarly, in Wuggubun there was support for night patrols as a response to drunkenness as long as such initiatives were 'empowered and resourced' as well as support for programs such as training camps.²⁴ At Carnarvon there was support for community justice mechanisms

16. Ibid 30. The Northern Territory Government was supportive of this recommendation in principle; however, it stated that the proposal required detailed consideration, especially in relation to the types of offences that could be dealt with in this manner. See Northern Territory Government, *The Northern Territory Government Response to the Report of the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law: Towards Mutual Benefit* (November 2003) 4.

17. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (2003): see <http://www.hreoc.gov.au/social_justice/customary_law/nt_lawreform.html>.

18. Ibid 34.

19. Ibid 40.

20. See 'The Commission's Proposal for Community Justice Groups', below pp 133–41.

21. Government of Western Australia, *Statement of Commitment to a New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians* (October 2001). The Indigenous Affairs Advisory Council (IAAC) is the mechanism for implementing the *Statement of Commitment to a New and Just Relationship*. It meets twice a year and has 11 members from a wide range of government agencies as well as four representatives from the Aboriginal and Torres Strait Islander Commission. The IAAC is described as the formal adviser to government on Indigenous affairs in Western Australia. See <<http://www.dia.wa.gov.au/Policies/StateStrategy/IAAC.aspx>>.

22. Note also that as part of its consultations with Aboriginal people for the Kimberley Regional Justice Project, the Department of Justice found that approximately 90 per cent of those questioned supported the greater use of 'safe houses and shelters' and there was similar support for more patrols and wardens for communities: see Colmar Brunton WA and Colmar Brunton Social Research, *Kimberley Regional Justice Project: Market Research* (Department of Justice, 2002) 22–23.

23. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

24. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 37.

developed from within community structures and for Justice Reference Groups to be established with representatives from each region.²⁵ The Burringurrah community also indicated its desire to use an outstation to rehabilitate young people.²⁶ During other consultations the need for Aboriginal-controlled community-based options and local justice structures were discussed.²⁷

It is clear from the community consultations that substance abuse and associated violence and sexual abuse are considered to be some of the most serious problems facing Aboriginal communities. The background paper by Neil Morgan and Joanne Motteram reviewed services and programs provided by the Department of Justice. It is apparent that services and programs for Aboriginal people in these areas are deficient. For example, Morgan and Motteram note that there are no specific Department-run Aboriginal family and domestic violence programs for Aboriginal offenders available in Western Australia,²⁸ although the Department of Justice advised that a program to deal with substance abuse, family violence and sexual offending for Aboriginal offenders and their families is currently being developed. It is intended that delivery of these programs will involve local Aboriginal people.²⁹ The Commission is of the view that the development of Aboriginal community justice mechanisms— that are community-owned as distinct to community-based—to deal with these issues is essential.³⁰

Government Policy and Initiatives

Western Australian Aboriginal Justice Agreement

On 31 March 2004 the *Western Australian Aboriginal Justice Agreement* (AJA) was signed by the Department of Justice, the Department for Community Development, the Department of Indigenous Affairs, the Western Australia Police Service, the Aboriginal and

Torres Strait Islander Commission (ATSIC), the Aboriginal and Torres Strait Islander Services (ATSIS) and the Aboriginal Legal Service of Western Australia (ALS). The AJA sets out a number of aims and principles focused on improving justice related outcomes for Aboriginal people in Western Australia.

The AJA specifies three justice outcomes: to achieve 'safe and sustainable communities'; to reduce the number of victims of crime; and to reduce the over-representation of Aboriginal people in the criminal justice system.³¹ The agreement encourages partnerships between Aboriginal people and government agencies in achieving these outcomes and promotes the right of Aboriginal people to identify solutions to their problems.³² Reference is made to a number of key areas which relate to community justice mechanisms and to the increased involvement by Aboriginal people in the criminal justice system.³³ These include:

- communities making enforceable decisions on justice issues;
- establishment of restorative justice mechanisms;
- increased use of alternative dispute resolution methods;
- improved opportunities for input from Aboriginal people into sentencing options;
- local Aboriginal community justice mechanisms;
- participation of Aboriginal people in the administration of justice;
- Aboriginal customary law; and
- optimising opportunities and increasing the capacity for community delivered services.

The AJA (which is to operate for five years) involves the development of a Western Australian Aboriginal Justice Implementation Plan, Regional Aboriginal Justice Plans and Agreements, and Local Justice Plans.³⁴ Regional reference groups have been formed to develop regional and local justice plans based on the previous

25. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.

26. Ibid.

27. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2002, 17; *Mirraboopa*, 18 November 2002, 11; *Rockingham*, 9 December 2002, 35; *Manguri*, 4 November 2002, 4–6.

28. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 68. The Commission notes that there are successful Aboriginal-run community-based services dealing with family violence, such as the Derby Family Violence Prevention Project (see discussion in Part VII 'Addressing Family Violence and Child Abuse in Indigenous Communities', below pp 352–57) and the Yamatji Family Violence Prevention Unit (see above pp 28–29).

29. Ibid 75.

30. In his background paper Blagg distinguishes between community-based initiatives, which are created by government and criminal justice agencies to operate in a community setting, and community-owned initiatives that empower communities to determine their own solutions. See Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 1–2.

31. *Western Australian Aboriginal Justice Agreement* (2004) 8–9.

32. Ibid 3.

33. Ibid 8–12.

34. Ibid 14–15.

nine ATSIC regions and membership of these reference groups is drawn from government and non-government agencies and Aboriginal community representatives.³⁵ Planning and development for the statewide Aboriginal Justice Plan and local and regional justice plans are currently in progress.³⁶ While some of these plans aim for greater involvement of Aboriginal people in the justice system, in general the justice plans focus on improved service delivery.³⁷ The Commission supports the development of these plans and considers that the regional and local reference groups already in existence could provide assistance to Aboriginal communities who wish to establish a community justice group under the Commission's proposal. Although it is now over 18 months since the agreement was signed, it is difficult to find any evidence of direct action which empowers Aboriginal people to determine their own justice issues and solutions. It is this deficiency which the Commission aims to overcome with its proposal for community justice groups. While the Commission supports plans and agreements between government agencies, non-government agencies and Aboriginal people which aim to improve services to Aboriginal people, it considers that structures which empower Aboriginal people and enhance cultural authority are integral to the functional recognition of Aboriginal customary law and the improved quality of life for Aboriginal people in this state.³⁸

The Aboriginal Alternative Dispute Resolution Service

The Aboriginal Alternative Dispute Resolution Service (AADRS) commenced in 1995 under the auspices of the Aboriginal Policy and Services Division of the Department of Justice. It aims to reduce the level of over-representation of Aboriginal people in the criminal

justice system by providing an effective and culturally appropriate form of dispute resolution primarily for family feuding. All AADRS staff are Aboriginal and the service operates throughout the state.³⁹ This is an example of a government-controlled service which aims to be culturally appropriate and incorporate Aboriginal methods of resolving disputes. While the Commission supports these types of projects and considers that government services should be more culturally appropriate, the focus of the Commission is in supporting Aboriginal-controlled or Aboriginal-owned services.

Aboriginal Community Supervision Agreements

A scheme for Aboriginal Community Supervision Agreements commenced in 1993 between the Department of Justice and remote Aboriginal communities in the Kimberley, Pilbara and Goldfields. The voluntary scheme involves Aboriginal communities in the supervision of offenders in conjunction with the Department of Justice. The community council of a participating Aboriginal community nominates the supervising officer and undertakes to ensure that supervision and other obligations of the order are met as well as advising the Department of Justice community corrections officer of any non-compliance.⁴⁰

The plan, under this arrangement, to train as many potential community supervisors as possible takes into account Aboriginal customary law considerations by recognising that there needs to be a sufficient choice of supervisors to avoid the problems where a skin group relationship would make a supervisor inappropriate.⁴¹ On the other hand, the scheme does not provide for Aboriginal customary law ways of dealing with offenders

35. Department of Justice, *Aboriginal Justice Agreement Progress Report as at 30 June 2005* (2005) 1.

36. Ibid.

37. Ibid. Examples of plans that support the involvement of Aboriginal people in the justice system are Halls Creek (Priority 2 – Indigenous leaders groups to be involved in the court system) and Wiluna (Priority 4 – Aboriginal community participation in court processes).

38. In this regard the Commission notes the comments in Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 105 that the AJA had yet to result in any practical improvements for justice issues for Aboriginal people. Similar observations can be made about the *Kimberly Regional Justice Project* which commenced in 2000 and has so far undertaken extensive consultations with Aboriginal people from the Kimberly region and reported back to the Kimberly communities in relation to those consultations. The report indicated that in 2003 further consultations would take place. See Department of Justice, *Kimberly Regional Justice Project: Report Back to Kimberly Communities on the Research and Consultations So Far* (2003) 20. The Commission also notes the views expressed by respondents during consultations at Fitzroy Crossing, in particular that there were concerns that the AJA was a 'top down' initiative and that there was a need to 'build a justice strategy from the bottom up': see LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 46. The Commission acknowledges and supports the recommendations of the Kimberley Aboriginal Reference Group in relation to the Kimberley Custodial Plan (October 2005).

39. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 19–20. The Department of Justice advised that the AADRS was formally evaluated in 2003; however, the results of that evaluation are not known.

40. Parriman F & Daley D, 'Aboriginal Community Supervision Agreements in Western Australia' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services, Adelaide, 13–15 October 1999) 2–3.

41. Ibid 4.

because the agreements expressly provide that it 'cannot be used to validate or enforce forms of behavioural control on community members other than those specified in the document itself'.⁴²

The Gordon Inquiry recommended that the use of Community Supervision Agreements in remote communities should be expanded as long as there are appropriate supports and training for the community members to manage offenders.⁴³ The scheme has recently been extended to include juvenile offenders⁴⁴ and is intended to provide a structure for the increased involvement of Aboriginal communities in juvenile justice diversionary processes.⁴⁵ These community supervision agreements have reportedly been effective in improving the supervision and performance of Aboriginal offenders subject to community-based orders in remote communities, as well as raising the credibility of this sanction with the judiciary. As a consequence there has been an apparent increase in the use of community supervision orders in remote areas.⁴⁶ What the scheme lacks is the ability for Aboriginal communities to incorporate their own way of 'doing things' through the use of both customary law and locally initiated justice mechanisms.

Cross Border Justice Project

The Department of Justice is leading a project between police and justice agencies in Western Australia, South Australia and the Northern Territory to address justice needs in their common border Ngaanyatjarra, Pitjantjatjara and Yankunytjatjara lands. The project will consider legislative changes to ensure the sharing of police, courts, community justice services and prison services.⁴⁷ The project anticipates that police from any of the three jurisdictions could charge, bail and prosecute an offender according to the applicable law, that the charges could be heard at the most convenient court location, and that any custodial

sentence could be served at the closest facility.⁴⁸ The Commission notes that the *Magistrates Court Act 2004* (WA) provides for the appointment of acting magistrates for the administration of justice in the lands which border Western Australia, South Australia and the Northern Territory and that this provision was considered necessary for the success of this project.⁴⁹ It has been acknowledged that this is one area where the reality of Aboriginal customary law can be recognised because Aboriginal customary law operates across state borders in these locations.⁵⁰ Any Western Australian Aboriginal community in this area that wishes to establish a community justice group should be able to liaise with, and make recommendations to, justice agencies in each jurisdiction about the operation of their community justice group within the criminal justice system.

Aboriginal Community Justice Mechanisms

The Commission supports the greater use of community justice mechanisms within Aboriginal communities, as well as the establishment of a scheme which allows these initiatives to play a significant role within the general criminal justice system. While a thorough review of all community justice mechanisms in Western Australia is beyond the scope of this Discussion Paper, the following section provides examples of some of the more common successful initiatives. The purpose is to show how these initiatives operate in order that the Commission's proposal in relation to community justice groups can be properly understood.

Patrols

Aboriginal community patrols have been formally supported and funded by the Department of Indigenous Affairs since 1995. There are currently 21

42. Ibid.

43. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in aboriginal communities* (2002) 259.

44. *Young Offenders Act 1994* (WA) ss 17A–17D.

45. Recent amendments to the *Young Offenders Act 1994* (WA) allow for the chief executive officer to appoint a member of an approved Aboriginal community to be a Juvenile Justice Team Coordinator and where 'considerations of practicality, distance or cultural sensitivity make it appropriate' a warden, Elder or other member of an approved Aboriginal community can sit on the team instead of a police officer: see *Young Offenders Act 1994* (WA) ss 36(2), 37.

46. Parriman F & Daley D, 'Aboriginal Community Supervision Agreements in Western Australia' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology in conjunction with the Department for Correctional Services, Adelaide 13–15 October 1999) 5–6.

47. Department of Justice, *Annual Report 2003/04* (2004) 34.

48. Remote Service Delivery Project Steering Committee, *Warburton Multi-Functional Police Facility Service Delivery Model: Final Report* (Government of Western Australia, September 2003) 23–24.

49. *Magistrates Court Act 2004* (WA) cl 10 sch 1. See also Magistrates Court Bill 2003, Explanatory Memorandum, 2.

50. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 106.

community patrols operating in Western Australia.⁵¹ In theory, patrols focus on alcohol and substance abuse issues in addition to diverting Aboriginal people away from the criminal justice system; however, the precise role of a patrol is, in practice, determined by the needs of the community. Patrols often work closely with other community justice mechanisms (such as sobering-up shelters) and police⁵² and operate in a 'non coercive' manner with the aim of improving community wellbeing and safety.⁵³ Patrols have been successful in reducing the number of arrests of Aboriginal people for public order and related offences.⁵⁴



conclude that their 'aspirations were of lesser importance'.⁵⁶

One such patrol, the Marrala Patrol in Fitzroy Crossing, had been operating successfully since the mid-1990s; however, in 2003 it lost its funding as a consequence of the failure by other agencies to take into account the Aboriginal customary law parameters under which it must operate. Marrala's primary role was to provide a safe method of transport from the Crossing Inn back to Aboriginal communities. Problems emerged when a sobering-up shelter was established in 1998 by the Western Australian Drug Abuse Strategy Office. The Marrala Patrol was not consulted about who would have the responsibility for taking people to the shelter, although the police and the shelter appeared to assume that the patrol would take on this function. In fact, the Marrala Patrol was only permitted under customary law to take an Aboriginal person to the shelter if that person consented. Without such consent, the members of the patrol would be held responsible under Aboriginal customary law for any death or injury that might occur at the shelter, rendering them subject to payback.⁵⁵ Because other agencies considered that the patrol should transport Aboriginal people to the shelter regardless of the circumstances it was denied funding. During its consultations the Commission was told that this situation caused the Aboriginal community to

A similar problem has occurred with the Nyoongar Patrol in Perth. The Nyoongar patrol operates in the inner-city area, providing welfare and social assistance to Aboriginal people with the aim of reducing conflicts and interactions with police.⁵⁷ While the patrol members understand their role as providing a service to Aboriginal people, other interest groups—such as local businesses in Northbridge—believe that the patrol essentially consists of publicly funded security officers.⁵⁸ If the patrol members were to act solely as security officers then the service would lose the capacity to actively address the social and welfare issues of Aboriginal people at street-level or act to diffuse volatile situations with the police.⁵⁹ A recent newspaper article confirmed this ongoing problem when it was reported that the Nyoongar Patrol would lose some of its funding from the City of Perth as a consequence of this loss of support from Northbridge traders.⁶⁰ Fortunately, in July 2005 the Department of Indigenous Affairs announced a significant funding agreement to enable the continuing work of the patrol.⁶¹

The Commission considers that these two examples clearly support the conclusion of Blagg and Valuri, in their research on Aboriginal night patrols, that such

51. Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Commonwealth Attorney-General's Department, 2003) 25.

52. Policy and Coordination Directorate Department of Indigenous Affairs, *Building Stronger Communities* (2002) 22.

53. Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Canberra: Commonwealth Attorney-General's Department, 2003) 25.

54. Ibid; Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 41.

55. Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 213–14.

56. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 43.

57. Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness: Final report* (Melbourne, 2001) 237.

58. Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 212–13; Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Canberra: Commonwealth Attorney-General's Department, 2003) 27.

59. Parliament of Victoria Drugs and Crime Prevention Committee, *Inquiry into Public Drunkenness: Final report* (Melbourne, 2001) 239.

60. Parker G, '\$122,000 Funding Cut to Curb Nyoongar Patrol', *The West Australian*, 25 June 2005, 54.

61. Department of Indigenous Affairs, *Tarwagin Newsletter*, 6 July 2005: see <<http://www.dia.wa.gov.au/newsletter/default.aspx>>.

patrols 'operate best when they remain culturally embedded in Indigenous communities, respect local cultural protocols and operate from within Aboriginal terms of reference'.⁶² As discussed earlier, the Ngooda-Gardy Patrol in South Hedland and the Yamatji Patrol in Geraldton are just two examples of successful patrols operating in Aboriginal communities.⁶³ In suggesting the establishment of Aboriginal community justice groups the Commission encourages justice groups to evolve from or work with existing successful community justice mechanisms.

Women's initiatives

In 2002 Aboriginal women Elders from Broome established the Peninsula Women's Group as a result of increasing concern about child sexual abuse in their communities. After an initial bush meeting the group organised activities such as educating women on how to recognise signs of child sexual abuse, designing literature for children and discussing options for offenders such as removal from the community.⁶⁴ In order to obtain funding from ATSIC the group was required to be incorporated, and, as Catherine Wohlan describes in her background paper, what began as a 'grass-roots initiative using Aboriginal authority structures' turned into a more bureaucratic, less flexible and slower organisation.⁶⁵

The Fitzroy Valley Action Group also emerged from the efforts of local women with the primary focus of addressing alcohol abuse. Following a successful community meeting with over 200 people attending, the group liaised with police and the local magistrate about alcohol issues and their actions led to the formation of a number of night patrols in the communities in the Fitzroy Valley.⁶⁶ As Wohlan concludes, Aboriginal women are developing successful mechanisms for dealing with social problems through the 'assertion of culture'.⁶⁷ The Commission considers that it is crucial that any proposal for community justice

mechanisms must incorporate the views of and initiatives developed by Aboriginal women.

Other initiatives

As set out in the discussion of the community consultations in Part II, many Aboriginal communities considered that a return to traditional cultural practices would solve the problems with Aboriginal youth.⁶⁸ Wohlan describes a successful initiative which involved bush trips for troubled teenagers in Fitzroy Valley and the use of Aboriginal culture to restore the cultural authority of Elders and to change inappropriate behaviour:

The Kurungal Yirraman track was walked by a group of teenagers, regarded as affected by 'drugs, alcohol and American movies', as a form of punishment. The teenagers were made to find and carry their own water and hunt for food. The walk educated the teenagers about resource use of country (eg, bush foods and medicines) and passed on knowledge of cultural sites. They were shown how to light fires, build windbreakers and serve meat properly. Within a couple of days their behaviour was described as changed. They started to bond with and show respect for the elders guiding the walk; they did as they were instructed and then did things without even being asked. They brought the experience of the walk back to the school and did a school project related to the walk. While on the track the teenagers forgot about the alcohol and drugs and understood more about their elders, their country and their cultural heritage.⁶⁹

In his background paper, Blagg outlines the work of the Derby Family Violence Prevention Project which was established in the late 1990s. The project, which was funded by the National Crime Prevention Program and managed by the local shire, has supported specific Aboriginal-controlled programs.⁷⁰ Blagg observes that this project takes into account Aboriginal cultural factors by having separate programs and separate spaces for young men and young women and that the project works closely with Elders.⁷¹ For example, the Mowanjam

62. Blagg H & Valuri G, 'Self-Policing and Community Safety: The work of Aboriginal community patrols in Australia' (2004) 15 *Current Issues in Criminal Justice* 205, 210. In a comprehensive evaluation of Indigenous alcohol and drug facilities and patrols in Australia it was concluded that the 'Indigenous perspective' is crucial to good practice for Indigenous substance misuse services: see Strempel P, Saggars S, Gray D & Stearne A, *Indigenous Drug and Alcohol Projects: Elements of Best Practice*, Australian National Council on Drugs Research Paper No 8 (2003) ix.

63. See discussion in Part II 'Alcohol and other drug intervention projects', above pp 28–30.

64. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 43.

65. *Ibid.*

66. *Ibid* 44–45.

67. *Ibid* 47.

68. See Part II 'Children and Youth', above pp 20–23.

69. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 41.

70. Poelina A & Perdrisat I, *A Report of the Derby/West Kimberley Project: Working With Adolescents to Prevent Domestic Violence* (Canberra: Attorney-General's Department, January 2004) 9.

71. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13.

The Commission considers that it is crucial that any proposal for community justice mechanisms must incorporate the views of and initiatives developed by Aboriginal women.

Aboriginal Community has both a men's centre and a women's centre. The men's centre, which also functions as a football club, has applied codes of behaviour to reduce alcohol and violence. The men were also involved in bush trips which reportedly 'strengthen cultural affirmation and social cohesion'.⁷²

Funding of Western Australian community justice initiatives

Aboriginal community justice mechanisms currently operating in Western Australia are principally funded by government. Community-operated patrols are funded by the Department of Indigenous Affairs.⁷³ In 2000 the responsibility for funding the Aboriginal wardens' scheme, discussed below, was transferred from the Aboriginal Affairs Department to the Western Australian Police Service.⁷⁴ The Indigenous Community Partnerships Fund is currently operated by the Department for Community Development and it provides one-off grants for up to \$15,000 for community initiatives to address issues identified by the Gordon Inquiry.⁷⁵ In order to obtain a grant an organisation must either be incorporated⁷⁶ or be a local government authority.

There is also evidence of funding for Aboriginal community justice mechanisms from the private sector. For example, a partnership between the state government and BHP Billiton Iron Ore to provide \$100,000 and \$300,000 respectively to the Ngooda Gardy Community Patrol in Port Hedland was recently announced.⁷⁷ The Munjurla Study, which was undertaken as part of the Western Australian COAG

trial in the Kadjungka/Tjurabalan region of the East Kimberly, sets out a 'new way of doing business with remote Aboriginal communities based on strong and enduring partnerships between the region, government and the private sector'.⁷⁸ The Commission supports this approach on the understanding that it will result in greater support for community initiatives from all sectors. However, regardless of the funding source, care is needed to ensure that accountability for a project is to the Aboriginal community which it is designed to serve and to ensure that the types of problems that occurred in respect of the Marrala Patrol and the Nyoongar Patrol are not repeated.

The Western Australian Aboriginal Community By-Law Scheme

The Aboriginal community by-law scheme aims to assist certain Aboriginal communities in the control and management of behaviour on their community lands. The scheme which operates under the *Aboriginal Communities Act 1979* (WA) ('the Act') was developed in the 1970s by Magistrate Terry Syddall out of concern that Aboriginal people lacked understanding of the general court system.⁷⁹ The original intention was that offences under the by-laws would be dealt with by Aboriginal justices of the peace in community courts. An early review of this aspect of the scheme found that, despite the original intention, these courts rarely sat without the non-Aboriginal magistrate being present.⁸⁰ It was highlighted in a review of the Act that the literacy requirement for justices of peace often

72. Poelina A & Perdrisat I, *A Report of the Derby/West Kimberley Project: Working With Adolescents to Prevent Domestic Violence* (Canberra: Attorney-General's Department, January 2004) 20–21.

73. Department of Indigenous Affairs: see <<http://www.dia.wa.gov.au/DIA/Funding/Patrols/default.aspx>>.

74. Western Australian Police Service, *Newsbeat*, 14 June 2002, 19.

75. Department for Community Development: see <<http://www.community.wa.gov.au/Resources/NotForProfitFundingAndGrants/Grants/CommunityPartnershipsFundGrants.html>>.

76. The organisation must be incorporated under the *Associations Incorporations Act 1987* (WA) or the *Aboriginal Council and Associations Act 1976* (Cth).

77. Department of Indigenous Affairs, 'New Look Street Patrol Boosts Port Hedland Community' (Media Statement, 21 June 2005): see <http://www.dia.wa.gov.au/news/news_187.aspx>. The partnership will provide job related training and qualifications to the patrol workers and one long-term worker has been appointed full-time supervisor of the patrol and he is now no longer paid through the CDEP scheme.

78. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 33.

79. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [9.3].

80. Hoddinott A, *That's 'Gardia' Business: An evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (1984) 34.

excluded Elders even though they were considered by many Aboriginal communities to be the most suitable candidates.⁸¹ Currently there are 25 Aboriginal communities that have by-laws in force. The Act was originally intended to provide a form of limited self-governance; however, the scheme has not generally been successful.⁸²

The Operation of the Aboriginal Communities Act 1979 (WA)

The Act allows certain Aboriginal communities to make by-laws in relation to controlling behaviour on their community lands. The by-laws cover a number of matters including:

- the admission of people, vehicles and animals onto community lands;
- the designation of places which are out of bounds;
- the prohibition of nuisance or any offensive, indecent or disorderly behaviour;
- the possession, use or supply of alcohol or deleterious substances;
- the possession of firearms;
- entering houses without permission; and
- property damage.⁸³

Some communities have included a by-law which provides that, where the person was acting under a custom of the community, it is a defence to a charge of breaching a by-law.⁸⁴ The ALRC was of the view that the circumstances in which this defence could be relied on were limited. It would have possible application to offences in relation to entry onto lands, causing disturbances and the interruption of meetings.⁸⁵ As proceedings are heard in the Magistrates Court and transcripts are not publicly available the Commission is not aware of any cases where this defence has been successfully relied upon.

Invitation to Submit 2

The Commission invites submissions on the extent to which the defence of acting under a custom of the community has been relied upon by Aboriginal people accused of breaching a by-law enacted under the *Aboriginal Communities Act 1979 (WA)* and whether the defence was successful.

An Aboriginal community can only make by-laws if it is a community that has been declared by the Governor to be a community to which the legislation applies. The by-laws themselves must also be approved by the Governor following recommendation by the Minister for Indigenous Affairs.⁸⁶ The Minister is required to consider, when recommending to the Governor that a community should be declared as a community to which the Act applies, that there are provisions in the constitution or rules of the community that require the council to adequately consult with members of the community (in relation to the nature of any by-laws).⁸⁷ The Governor is authorised to declare the boundaries of the community lands for a particular community. By-laws are limited in their application to those community lands, although they apply to *all people* who are on those lands, regardless of whether they are a member of the community.⁸⁸

Enforcement of by-laws and penalties for breach

Enforcement of community by-laws is the responsibility of the police⁸⁹ and if charged a person will be dealt with by the Magistrates Court. The potential ability for Aboriginal justices of the peace to deal with offences has been significantly affected by recent legislation which limits the jurisdiction of justices of the peace.⁹⁰ As mentioned in Part II, the current maximum penalty

81. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 14.
 82. The Lingjari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 117.
 83. *Aboriginal Communities Act 1979 (WA)* s 7.
 84. See, for example, Wongatha Wonganarra Aboriginal Community By-Laws 2003, by-law 13 and Djarindjin Aboriginal Community By-Laws 1997, by-law 14. Note that the ALRC was informed by a magistrate that this defence had been rarely used and when so, with limited success: see ALRC *Aboriginal Customary Law and Local Justice Mechanisms: Principles, options and proposals*, Research Paper No 11/12 (1984) 69.
 85. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [445]–[446].
 86. *Aboriginal Communities Act 1979 (WA)* ss 4 & 8(3).
 87. *Aboriginal Communities Act 1979 (WA)* s 4(2).
 88. *Aboriginal Communities Act 1979 (WA)* ss 6 & 9.
 89. *Aboriginal Communities Act 1979 (WA)* s 7(2).
 90. Magistrates Court Regulations 2005, regs 8, 10, 11. These regulations limit the circumstances in which a Justice of the Peace can sit alone or with another Justice of the Peace. In particular in a country location, one Justice of the Peace can only deal with bail and adjournments and only if it is impractical for two Justices of the Peace to sit. Two justices of the peace (sitting together) can only deal with bail, adjournments and deal with a simple offence if the accused pleads guilty and both the prosecutor and the accused agree. The Commission notes that the RCIADIC recommended that jurisdictions that had not already done so should phase out the use of Justices of the Peace for the determination of charges and the imposition of penalties: see RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [22.4.27] Recommendation 98. The Commission understands that there must be an appropriate balance between the powers of justices of the peace and ensuring that people from remote areas are not disadvantaged by the lack of judicial officers available.

for an offence under community by-laws is a fine of \$5,000.⁹¹ In 2004 imprisonment was removed as an option. The Commission's consultations indicated that some communities sought its reinstatement as a penalty for breach of by-laws.⁹² In most cases the by-laws which are currently in force limit the penalty to a fine of \$100. However, some communities have included a by-law which states that the penalty may be a fine of up to the \$5,000 maximum provided for by the legislation.⁹³ If a person is fined by the Magistrates Court for breaching a by-law the fine is paid to the community council for the use of the community.⁹⁴ Failure to pay the fine is enforced in the same manner as any other monetary penalty and may eventually lead to imprisonment.⁹⁵

The by-laws do not affect general criminal liability under Australian law.⁹⁶ There are some matters which may be an offence against a by-law as well as an offence against a general criminal law statute. On the other hand, there are some matters (for example, possession of alcohol) that are not offences against the general

criminal law and will only be an offence on the relevant community lands. Therefore, a person may be charged with both an offence under the by-laws and an offence under the general criminal law. Indeed, the Commission heard examples of young Aboriginal people being charged with a by-law offence in relation to the possession of a volatile substance and, in addition, an offence of stealing as a consequence of taking the petrol without consent.

The role of wardens

In some Aboriginal communities operating a by-law scheme the police are supported by Aboriginal wardens⁹⁷ who are drawn from the particular community. Wardens were previously appointed as special constables under the *Police Act 1892* (WA); however, this practice ended in 1998.⁹⁸ Although they assist police in identifying breaches of by-laws, the wardens do not have the power to arrest offenders.⁹⁹ Indeed, the warden scheme is simply an administrative measure and has no enabling legislation. Nonetheless, some communities have enacted by-laws that purport to empower wardens to investigate breaches and enforce the by-laws.¹⁰⁰ These types of provisions appear to be *ultra vires* and have led to some uncertainty about the respective roles of police and wardens in the enforcement of by-laws.

In a 1992 review of the *Aboriginal Communities Act 1979* (WA), Andrea McCallum emphasised that each of the 13 communities consulted for the review supported legislative recognition of the warden scheme.¹⁰¹ It has been noted elsewhere that the warden scheme was 'actively marketed' to Aboriginal communities by various government



91. *Aboriginal Communities Act 1979* (WA) s 7(2). It is noted that in the 1992 review of the Act, many communities indicated that the previous maximum fine of \$100 was too low to have any significant deterrent effect. See the summaries of community consultations in McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 2, July 1992).
92. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 8; *Cosmo Newbery*, 6 March 2003, 21. See also Ngaanyatjarra Community, *Law and Justice Submission to the Attorney General of Western Australia* (April 2002) 21–22.
93. For examples, see Ngaanyatjarra Council By-Laws 1989, by-law 14; Bidiyadanga Community By-Laws 2004, by-law 14; Djarindjin Aboriginal Community By-Laws 1997, by-law 16; Kundat Djaru Community By-Laws 2005, by-law 15(3).
94. *Aboriginal Communities Act 1979* (WA) s 12 and note that a court can also order compensation up to \$250 to the community for any damage caused by the breach.
95. *Fines Penalties and Infringement Notices Enforcement Act 1994* (WA) ss 28, 53.
96. *Aboriginal Communities Act 1979* (WA) s 13.
97. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 43 and note that the provision for wardens does not generally appear in the actual By-Laws themselves except for a few cases: see Warmun Community (Turkey Creek) Inc By Laws 1991, by-law 22.
98. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 15.
99. Western Australian Police Service *COP's Manual (Public Version)* (25 January 2005) AD-1.7.
100. Warmun Community (Turkey Creek) Inc By-Laws 1991, by-law 22; Kalumburu Aboriginal Corporation By-Laws 1991, by-law 18; Woolah Aboriginal Corporation By-Laws 1991, by-law 19.
101. McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Aboriginal Affairs Planning Authority, July 1992) 42–44. The review recommended that wardens be appointed from each main family, language or skin group and that women, Elders and young people should be eligible to act as wardens. The Commission notes that although the communities consulted by McCallum generally supported increased powers for wardens, some communities were critical of aspects of the warden scheme. See for example, Bidiyadanga, Djarindjin and Kalumburu communities in the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 2, July 1992) 4, 30 & 57.

agencies and that this 'marketing', coupled with the lack of police presence on many communities, has led to significant reliance on wardens and considerable support for the scheme.¹⁰²

Review of the By-Law Scheme as it Relates to the Criminal Justice System

Factors in support of the by-law scheme

Superficially the by-law scheme appears to give Aboriginal communities a degree of autonomy. Philip Vincent states that it is the only scheme under Australian law where 'Aboriginal communities can operate under their own laws'.¹⁰³ However, the government (through the Minister for Indigenous Affairs) retains the ultimate power over what matters can be included in the by-laws. The types of matters that are covered are generally a duplication of matters which already come under the umbrella of the criminal law rather than matters that reflect Aboriginal customary law.

The Commission acknowledges that some communities are in support of the by-law scheme; however, it has been suggested that this is probably only because there is no other choice.¹⁰⁴ Discussions with a representative of the Department of Indigenous Affairs indicated that, following a period of dysfunction, there has been some recent success with the scheme in Bidyadanga. In this community an informal system had been established for dealing with breaches of the community's by-laws. This involves a notice being given to the alleged offender by a warden, attendance by the alleged offender at a council meeting, the council determining whether a by-law has in fact been breached, and the voluntarily agreement by the offender to pay a fine. If the offender does not pay the fine or attend the council meeting, or if there have been a number of repeat offences, the matter is referred to the police.¹⁰⁵ There is nothing in the Bidyadanga Community By-Laws which authorises this process and in the Commission's

view, if such a scheme continued to be supported it could easily fit within the model for community justice groups proposed by the Commission below.¹⁰⁶

The Ngaanyatjaraku Shire Council has called for the re-introduction of imprisonment as a penalty for breaching by-laws. It was argued that when imprisonment was an option, volatile substance abusers were able to be sentenced to custody at a local substance abuse centre in Warburton.¹⁰⁷ The Commission is of the view that alternative options could be explored through the operation of community justice groups while at the same time avoiding the problems associated with introducing young people to the criminal justice system. In relation to most other offences that are commonly dealt with under the by-laws, offences available under Australian law have a wider range of penalty options available and, therefore, will be more effective for cases that are considered by the community to be the most serious or when the community wishes the matter to be dealt with under Australian law.

Factors against the by-law scheme

An additional set of laws

A review of the scheme in 1984 criticised the 'token acknowledgment of tribal custom' by providing for a defence based on the customs of the community and the failure of the scheme to allow Aboriginal people to practise their own customary law.¹⁰⁸ The review recommended that the Act should be amended to incorporate customary offences, sanctions and procedures.¹⁰⁹ Alternatively, the review suggested that the scheme could be abandoned altogether and that the participating communities return to Australian law.¹¹⁰ Of course, this last suggestion is somewhat misleading because communities remain subject to Australian law whether they have by-laws in place or not. Indeed, while it is often said that Aboriginal people face two laws (customary law and Australian law), those Aboriginal people living on communities with by-laws are in fact subject to three sets of laws.

102. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 13–14.

103. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 44.

104. Kamien T, *Implementing Self-Government – An Examination of the Aboriginal Communities Act (WA) (1995) 2(1) E Law: Murdoch University Electronic Journal of Law* 6.

105. Interview with Carolyn Petroboni, Department of Indigenous Affairs (Perth, 27 September 2004) and note that during these discussions the Commission was told that the success of the scheme was dependant on support given to the community by outside agencies and the fact that at that time there was a strong community council with representatives from all skin groups.

106. See discussion under 'The Commission Proposal for Community Justice Groups', below pp 133–41.

107. Ngaanyatjarra Community, *Law and Justice Submission to the Attorney-General of Western Australia* (April 2002) 21–22.

108. Hoddinott A, *That's 'Gardia' Business: An evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (1984) 34.

109. Ibid 2. The Commission notes that Phillip Vincent also supports the expansion of the scheme to incorporate customary law: see Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 44.

110. Hoddinott A, *That's 'Gardia' Business: An evaluation of the Aboriginal Justice of the Peace Scheme in Western Australia* (1984) 34.

As a result of the duplication of many offences under the general criminal law, the by-laws can have a net-widening effect¹¹¹ and add to the already high numbers of Aboriginal people being dealt with in the criminal justice system. Where an offence is contrary to both the by-laws and the general law there may be a conflict between the penalties that can be imposed.¹¹² The Commission is of the view that the criminal law is generally sufficient to deal with the types of matters that are covered by the by-law scheme. The main exceptions are in relation to alcohol and substance use and entry onto community lands. These matters are discussed in more detail below.

Enforcement problems

As Blagg comments, the by-law scheme has been 'sold as a panacea for a host of law and order and security issues on remote communities' and 'over-sold as a solution'.¹¹³ Because the scheme relies on police enforcement, it is ineffective for addressing law and order concerns on those communities that do not have a police presence.¹¹⁴ As a consequence of the lack of police presence and the absence of any enforcement mechanism, some community councils enforced breaches by imposing on-the-spot fines.¹¹⁵ One solution to this problem has been the suggestion that wardens be given enforcement powers; however, Aboriginal customary law considerations relating to skin obligations and avoidance issues can severely impinge upon a warden's ability to enforce by-laws.¹¹⁶ Since almost all communities consulted by the Commission expressed a desire for a full-time police presence, the Commission is of the view that legislation to give wardens powers of enforcement and arrest will be counter-productive. This does not prevent a community continuing to use wardens in an informal and flexible manner in the same way that patrols operate. In this regard it is noted

that patrols have been very effective throughout Australia without the necessity of enforcement powers.¹¹⁷ The Commission considers that Aboriginal wardens and patrols should not be required or expected to do the job of police and supports the improvement of remote policing services as recommended by the Gordon Inquiry.¹¹⁸

Limitation to community lands

A significant deficiency of the by-law scheme is that it only applies to community lands declared under the Act. In some communities, the community lands declared under the Act only cover the administrative and residential areas in the community while others include the entire reserve or pastoral lease.¹¹⁹ Community lands do not usually cover gazetted roads or government buildings, such as schools. The ability of by-laws to effectively control community behaviour is therefore limited and considerably undermined by the fact that a person could simply step outside a declared area to engage in prohibited activities, such as the consumption of alcohol.

In the 1992 review of the scheme it was recommended that the Act should be amended to provide that community lands be defined as the whole reserve or pastoral lease area and that this would avoid the need for the Governor to declare particular community lands.¹²⁰ While the Commission supports this recommendation it also allows, in its proposal for community justice groups, a more flexible scheme that relies on membership of the community and is not wholly dependant upon physical location. In other words, as a condition of residence, a member of a community may be required by the community justice group to comply with the community rules regardless of where they were physically located.

111. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 27.

112. The maximum fine that can be imposed for an offence against the by-laws is \$5,000. For the offence of disorderly conduct under s 74A of the *Criminal Code* (WA) the maximum penalty is \$6,000. The ALRC noted the conflict between the two sets of laws: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [750].

113. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 26.

114. Ibid. See also the discussion of enforcement issues, including lack of police presence, in the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Vol. 2, July 1992).

115. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum, *ibid* 40-41, 48, 93. The councils that used on-the-spot fines were concerned that they may be acting illegally.

116. It has also been noted that it is 'unrealistic to expect that people can police their neighbours, family and friends': see The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 113.

117. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 30.

118. It is noted that the government has responded favourably to this recommendation: see Western Australian Government, *Second Progress Update On the Implementation of 'Putting People First': Addressing Family Violence and Child Abuse in Aboriginal Communities* (December 2003) 7. See also the discussion under 'Policing Aboriginal Communities', below pp 250-51.

119. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 26.

120. Ibid 99.

Lack of cultural authority

An important reason for the general failure of the by-law scheme is that it is controlled by community councils which are not necessarily reflective of traditional authority structures and are sometimes significantly dysfunctional.¹²¹ Toohey observes that council members are not generally chosen 'because of their deep knowledge of traditional matters' but rather for their ability to deal with government agencies and service providers.¹²² Inevitably, the cultural authority of Elders has been weakened by the authority placed in council members under the by-law scheme and this has, in some instances, undermined customary law.¹²³ This was confirmed at the consultations in Broome where the Commission heard that a principal flaw of the by-law scheme is that it 'involves the choice of enforcers outside the skin group system of traditional law'.¹²⁴

Lack of autonomy

While some may see the by-law scheme as a way for Aboriginal people to make their own laws, the Commission is of the view that the by-law scheme is no more than an adjunct to the general criminal justice system and has done little to improve the justice-related outcomes for Aboriginal people or to allow Aboriginal people to practise customary law. The Commission notes the view expressed during the consultations in Broome that the scheme is another example of imposing white ways on Aboriginal communities in the name of 'empowerment'.¹²⁵ This point was underlined by Inspector Galton-Fenzi, in his review of policing in remote communities, when he stated:

It is important to note that what commenced as a consultation process with consideration to the application and process of traditional law within the communities, resulted in a process, application and interpretation of rules and regulations based entirely on our laws and legal systems.¹²⁶

During the 1992 review of the scheme, members of the Bidyadanga community advised that they felt 'no

ownership' of their by-laws and considered that the by-laws were 'alien to their needs'.¹²⁷ Toohey explains that the by-law scheme is based on Australian law because it incorporates western concepts such as councils, written laws and courts. Even if it could be argued that the scheme attempts to reconcile two systems of laws; it is 'Australian law which in the end prevails'.¹²⁸

The Commission's View

The Commission is aware that the Department of Indigenous Affairs is currently conducting a review of the Act and that the Minister for Indigenous Affairs has acknowledged that any legislative changes to the Act will require 'extensive consultation with all key stakeholders, particularly the Aboriginal communities to which the *Aboriginal Communities Act 1979* (WA) may apply'.¹²⁹ Taking the factors in support of and against the scheme into account, it is the Commission's view that the Act should be repealed. In making this proposal the Commission is particularly persuaded by the fact that the by-laws appear to simply create another layer of law applicable only to Aboriginal communities, but that have no cultural basis in the custom of those communities. At the conclusion of this section the Commission details a proposal that seeks to enhance the cultural authority of Elders and offer a culturally appropriate and community-owned process for control of behaviour currently addressed under the by-law scheme.

Proposal 11

That the *Aboriginal Communities Act 1979* (WA) be repealed. As an alternative, Aboriginal communities should be empowered to establish community justice groups and decide their own community rules and sanctions. For this purpose the Commission has proposed the 'Aboriginal Communities and Community Justice Groups Act'—see Proposal 18.

121. The by-law scheme has also been undermined by complaints in some communities that council members have themselves breached by-laws, in particular in relation to the consumption and supply of alcohol: *ibid* 22.

122. Toohey J, *Understanding Aboriginal Law* (1999) 28 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

123. The Munjurla study notes that a system of by-laws which attempts to override the traditional and higher authority of Elders is unlikely to succeed in the long-term. The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 115.

124. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 26.

125. *Ibid*.

126. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 13.

127. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 2, July 1992) 6–7.

128. Toohey J *Understanding Aboriginal Law* (1999) 29 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 41.

129. Minister for Indigenous Affairs, *Hansard*, Legislative Assembly, 17 August 2004, 5043 (The Hon JC Kobelke).

By-laws appear to simply create another layer of law applicable only to Aboriginal communities, but [they] have no cultural basis in the custom of those communities.

In recognition of the government's prerequisite that any legislative changes to the *Aboriginal Communities Act 1979* (WA) should not take place without full consultation with the Aboriginal communities to which the legislation applies, those communities should be consulted simultaneously in relation to whether they support this proposal and, if so, whether, and on what terms, they wish to establish a community justice group.

Consequential Amendments to General Criminal Law Offences

As discussed above, by-laws cover a number of areas that are also covered by the general criminal law such as damage, disorderly conduct, trespass, drink-driving, careless or dangerous driving and littering.¹³⁰ If the by-law scheme is abolished then certain offences under the general law must be amended to expressly apply to lands occupied by communities declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. Communities that are currently declared under the *Aboriginal Communities Act 1979* (WA) will be deemed to be declared under the new Act.

Having said this, the Commission is not suggesting that the focus of control on Aboriginal communities should be based upon these legislative provisions; rather, the Commission supports individual communities using their own methods of cultural and social control. The reference to these offences under the general law, along with the proposed amendments, is to ensure that when necessary or desired by an Aboriginal community, Australian law is available in the same way as it is to other Australians.

Disorderly Behaviour

The offence of disorderly behaviour under s 74A of the *Criminal Code* (WA) relates only to behaviour in a public place. Public place is defined in s 1 of the *Criminal Code* to include:

- (a) a place to which the public, or any section of the public, has or is permitted to have access, whether on payment or otherwise;
- (b) a privately owned place to which the public has access with the express or implied approval of, or without interference from the owner, occupier or person who has the control or management of the place; and
- (c) a school, university or other place of education, other than a part of it to which neither students nor the public usually have access.

Proposal 12

That the definition of public place in s 1 of the *Criminal Code* (WA) be amended to include a discrete Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' other than an area of that community which is used for private residential purposes.

Traffic Offences

Offences under the *Road Traffic Act 1974* (WA) which regulate the manner of driving, such as careless, dangerous and reckless driving and driving under the influence of alcohol, include a common definition as to what amounts to 'driving' or 'attempting to drive'. Section 73 of the *Road Traffic Act* provides that references to driving mean driving on a 'road or in any place to which the public is permitted, whether on payment of a fee or otherwise, to have access'. Whether a road or place is a 'place to which the public is permitted' to have access is a question of fact which turns on the actual usage of the place rather than its legal status.

In *Talbot v Lane*¹³¹ a private road on a mining lease was held to be a 'place to which the public is permitted'. In this case, boom gates were situated at the boundary of the lease together with a sign which indicated that

130. See *Criminal Code* (WA) s 70A Trespass; s 74A Disorderly Behaviour in Public; ss 444–445 Damage; *Litter Act 1979* (WA) s 23 Littering; *Road Traffic Act 1974* (WA) ss 59–72.

131. (1994) 14 WAR 120.

the use of the private road by members of the public was strictly prohibited. However, the decision turned on the fact that the boom gate was usually open and the fact that tourists and members of the public still freely accessed the road (despite the sign). Therefore, whether this definition would cover Aboriginal communities currently declared under the *Aboriginal Communities Act 1979* (WA) may vary from community to community. The Commission considers that, in the circumstances, it would be desirable to amend s 73 to ensure that declared Aboriginal communities are brought within the terms of the *Road Traffic Act 1974* (WA).

Proposal 13

That s 73 of the *Road Traffic Act 1974* (WA) be amended to bring lands of an Aboriginal community declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' within the definition of 'driving'.

Trespass

Access into many Aboriginal communities is partly governed by the *Aboriginal Affairs Planning Authority Act 1972* (WA). Under this legislation the Aboriginal Lands Trust has responsibility for the management of Aboriginal Reserves. The *Aboriginal Affairs Planning Authority Act* provides for a permit system and the Minister approves permits for entry onto Aboriginal reserves.¹³² Without such a permit it is an offence to enter or remain on any land which has been reserved for the use of Aboriginal people unless the person is an Aboriginal person, Member of Parliament, police officer, public health officer, officer of a public authority or otherwise lawfully authorised.¹³³

The Aboriginal Lands Trust leases reserves to many Aboriginal organisations and where this is the case, unless the lease states otherwise, the Aboriginal organisation which holds the lease (usually the community council) has the power to restrict entry to the land covered by the lease.¹³⁴ In this situation the

offence of trespass under s 70A of the *Criminal Code* would be applicable. Section 70A provides that it is an offence to enter, be in or remain in any place without the consent or licence of the owner, occupier or person having control or management of the place. A person who trespasses without a lawful excuse is liable to a maximum of 12 months' imprisonment or a \$12,000 fine. Section 70A also provides that the police can ask someone to leave the place if requested to do so by the owner, occupier or person having control or management of the place. For those communities that have leases over reserved land, the community council (as lessee) would be considered to have the relevant control or management of the place and therefore may refuse entry or permission for someone to remain on their community. It should be noted that, since the offence of trespass provides for a defence of 'lawful excuse', anyone who has been granted a permit to enter the lands or otherwise has statutory authority to enter a community would not be guilty of an offence.¹³⁵

For those communities which occupy reserve lands without a lease, while the community council would be able to exclude outsiders, it is arguable whether the community council would be able to refuse entry to a member of the community itself. This situation was resolved in the *Aboriginal Communities Act 1979* (WA) by the ability to make by-laws giving authority to the community council to decide who can enter and remain on the community lands including members of the community itself.¹³⁶ If, as the Commission has proposed, the ability of Aboriginal communities to make by-laws is abolished, there is a need to ensure that Aboriginal communities retain the ability to prohibit entry to the community, including members of the community. In this regard the Commission notes that, although exercised infrequently, the right to exclude is part of Aboriginal customary law. Under Aboriginal customary law the exact parameters of this right is complex; it is qualified by kinship rules and obligations and encompasses a requirement to seek permission from the appropriate people (either indirectly or directly) to enter specific areas of land.¹³⁷ While the Commission considers that it would be rare for an Aboriginal

132. See <http://www.dia.wa.gov.au/Land/Permits/About_Permits.aspx>.

133. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 31.

134. See <<http://www.dia.wa.gov.au/Land/Facts/Q09.aspx>>.

135. Note that by-laws which seek to give a community council the right to exclude persons from their community are also subject to the Australian law and any specific statutory authority for someone to enter the community. See *Aboriginal Communities Act 1979* (WA) s 13.

136. See, for example, Wongatha Wonganarra Aboriginal Community By-Laws 2003, by-laws 4 and 9 which provide that the council can order a member of the community to leave if he or she is drunk; and the Bidyadanga Community By-laws 2004, by-law 4 which provides that a member of the community can be on the community lands at any time unless removed by a police officer for breaching the by-laws.

137. Sutton P, *Kind of Rights in Country: Recognising customary rights as incidents of native title*, National Native Title Tribunal, Occasional Paper Series No 2 (2001) 26–28.

community to exclude one of its members, discrete Aboriginal communities must be afforded the protection which this right entails.

Proposal 14

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a provision relating to the prohibition and restriction of people on community lands. This provision should state that the community council of a discrete community which has been declared under the Act has the right, subject to the laws of Australia, to refuse the entry of any person into their community and, if permission for entry is granted, to determine on what conditions the person may remain on the community. It is an offence, without lawful excuse, to fail to comply with the conditions or enter without permission. This offence has the same penalty as the offence of trespass under the *Criminal Code* (WA).

Further, that a specific provision in relation to community members provide that the community council can, by giving reasonable notice, ask a member of the community to leave the community or part of the community for a specified period of time. Failure to leave the community, or returning to the community during the specified period, without lawful excuse constitutes an offence of trespass. Where a community has established a community justice group the community council can only ask a member of the community to leave if it has been recommended by the community justice group.

That these provisions expressly state that a member of the police force can remove a person who has not complied, within a reasonable time, with the request of the community council to leave the community.

There may be instances when an Aboriginal person has been asked to leave the community for a specified time and is subsequently obliged to return for a specific customary law purpose, such as participation in a ceremonial process. Therefore, the Commission considers that it may be necessary to recognise this by the inclusion of a defence which acknowledges that

entry onto particular lands may be justified under Aboriginal customary law. This takes into account the fact that many Aboriginal communities are made up of both traditional owners and of people who are historically the long-term residents of the community, and that the customary law obligations of traditional owners in particular need to be acknowledged.¹³⁸ It was noted above that a defence of custom has been incorporated into some community by-laws and the Commission has sought submissions to establish the effectiveness of that defence (see Invitation to Submit 2). The Commission therefore also seeks submissions as to whether there should be a customary law defence available to an offence of entering or remaining on community lands and, if so, on what terms.

Invitation to Submit 3

The Commission invites submissions as to whether (and if so, on what terms) there should be a customary law defence to the offence of trespass in the proposed 'Aboriginal Communities and Community Justice Groups Act'.

Addressing Alcohol and Substance Abuse in Aboriginal Communities in the Absence of By-Laws

Substance Abuse

The Commission's consultations with Aboriginal people revealed that substance abuse, in particular petrol-sniffing, was of serious concern to many Aboriginal communities, both in regional and metropolitan areas. As discussed in Part II, 11 communities have passed by-laws prohibiting the possession, sale and supply of deleterious substances.¹³⁹ Although the enactment of by-laws appear to assist discrete Aboriginal communities to control the use and supply of harmful substances on community lands, these methods are unlikely to be effective for communities that are close to major regional centres or within the metropolitan area. The high incidence of abuse of volatile substances in Perth (by both Aboriginal and non-Aboriginal users) is a significant problem that needs to be comprehensively addressed.

¹³⁸ The Commission notes the observation that an important issue in terms of the relationship between traditional owners and residents is how the rights of Indigenous residents can be 'balanced and coordinated with the rights of traditional owners': see Sanders W, 'Thinking About Community Governance' (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 2004) 15.

¹³⁹ See Part II 'Inhalants', above pp 26–27.

The Commission notes that since these by-laws were enacted, a new offence has been created under s 206 of the *Criminal Code* (WA) which prohibits the supply of volatile substances or other intoxicants (excluding liquor) in circumstances where the person knows or where it is reasonable to suspect that someone will use the substance to become intoxicated. The maximum penalty for this offence is 12 months' imprisonment or a \$12,000 fine. It is therefore only the possession of these types of substances which is currently immune from general criminal liability. It is yet to be seen how effective this measure will be in addressing the problem in urban areas.

While the Commission acknowledges that some Aboriginal communities support the criminalisation of inhalant use, it is of the view that this is in conflict with the recognised need to divert Aboriginal people, especially young people, away from the criminal justice system.¹⁴⁰ Further, there is little evidence that these by-laws have been effective in addressing substance abuse. The Commission supports the provision of improved services for inhalant abusers¹⁴¹ as well as the supply of reduction initiatives such as the provision for alternative fuels.¹⁴² The Commission is of the view that its proposal in relation to community justice groups will provide alternative options for dealing with solvent abusers without the need for formal criminal charges.

The Commission observed during its consultations that some Aboriginal people expressed the view that police should have the power to confiscate volatile substances.¹⁴³ In fact the police already possess this power under the *Protective Custody Act 2000* (WA); however, its exercise is limited to public places. The power to seize an intoxicant (which includes alcohol, drugs and volatile substances) applies to children who are consuming (or about to consume) an intoxicant in a public place or to both adults and children who have been apprehended because they were already intoxicated. Apart from police, this power may be

exercised by authorised officers,¹⁴⁴ including public transport security officers and community officers.¹⁴⁵ A solution would be to extend the definition of 'public place' under the legislation to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act' and for the Commissioner of Police to appoint certain Aboriginal community members as authorised officers.

Members of a community justice group could be appointed to act in the capacity of community officers. Alternatively, a community may wish to select other members of their community for this function, such as patrol members or wardens. The *Protective Custody Act 2000* (WA) also gives authorised officers the power to apprehend people who are intoxicated (by alcohol or other substances) when it is considered necessary for their health and safety. If this occurs, the person should, where possible, be released into the care of another person or taken to an approved facility.¹⁴⁶ This course of action would give Aboriginal people in discrete communities the power to confiscate volatile substances from children and to make arrangements for their personal safety while recovering from the effects of the intoxicants.¹⁴⁷

Proposal 15

That the definition of 'public place' in the *Protective Custody Act 2000* (WA) be amended to include discrete Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'.

That the Commissioner of Police seeks nominations from Aboriginal community councils for the appointment of persons as community officers under s 27 of the *Protective Custody Act 2000* (WA).

140 See 'Police – Diversion', below pp 239–44.

141 See Part II 'Alcohol and Other Drug Intervention Projects', above pp 28–30.

142 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (Canberra, 2005) 8.18 where the success of alternative fuels in Northern Territory was noted. The Commonwealth budget for 2005 has committed to increasing the number of Aboriginal communities accessing the Comgas Scheme from 37 to 60. See Indigenous Budget Measure 9: Combating Petrol Sniffing: <<http://www.atsia.gov.au/budget/budget05/index.asp>>.

143 LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 27; *Midland*, 16 December 2002.

144 *Protective Custody Act 2000* (WA) ss 5, 6 & 9.

145 *Protective Custody Act 2000* (WA) ss 3 & 27. A public transport security officer can only seize intoxicants on property defined under the *Public Transport Act Authority Act 2003* (WA). Note that a community officer is a voluntary position appointed by the Commissioner of Police. The Gordon Inquiry noted that at the time of its report the Commissioner of Police had not yet appointed any community officers: see Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 227.

146 *Protective Custody Act 2000* (WA) ss 11, 12. Note that there are a number of sobering-up shelters which have been approved in regional towns. See *Protective Custody (Approved Places) Notice 2000*, *Government Gazette* No 285, 29 December 2000, 7926–27.

147 The Northern Territory has recently passed the *Volatile Substance Abuse Prevention Act 2005* (NT) which deals with the early intervention, prevention and treatment of volatile substance abuse. This legislation allows for the appointment of authorised officers to exercise powers to seize

Alcohol

As discussed earlier in Part II of this Discussion Paper, alcohol abuse is considered a significant problem for most Aboriginal communities. Research suggests that there is 'strong association between alcohol and violence, crime and anti-social behaviour'.¹⁴⁸ A recent study has found that there is a higher proportion of Indigenous male offenders that had used alcohol prior to arrest or prior to the commission of an offence than for non-Indigenous male offenders.¹⁴⁹ Similar results may be found in respect of Indigenous homicides where 65 per cent of Indigenous homicides involved both the offender and the victim having consumed alcohol.¹⁵⁰

Many Aboriginal communities have enacted by-laws to prohibit or regulate the sale and consumption of alcohol. The McCallum review of the by-law scheme highlighted that the desire of communities to control alcohol was the principal reason that most communities joined the scheme.¹⁵¹ Of the 25 Aboriginal communities that have by-laws, only six have a by-law which completely prohibits any use or possession of alcohol in their community. Most have enacted by-laws which allow the community council to grant permission for the use of alcohol in their communities.¹⁵² Generally, the scheme does not appear to have been successful in preventing alcohol use¹⁵³ and, as discussed in Part II of this paper, it appears that the by-law scheme has been even less effective for communities located near towns where alcohol is freely available.¹⁵⁴ Solutions that do not involve the by-law scheme have been more promising. A recent report observed that the Ringer Soak community, which is not part of the by-law scheme, has been the most effective community in prohibiting

alcohol in the Tjurabalan-Kutjungka region in East Kimberley. It appears that this success is due to strong leadership, a good relationship with the police and a policy of docking people's CDEP wages if they bring alcohol into the community.¹⁵⁵ The Commission also notes that the strategy in use at Halls Creek (which involves restrictions to alcohol trading hours as well as education and training programs) appears to have resulted in a decrease in hospital presentations in relation to alcohol and family or domestic violence.¹⁵⁶

In view of the many problems associated with the by-law scheme the Commission does not support the continued reliance on by-laws as an effective method for controlling or reducing alcohol use and related harm in Aboriginal communities. It has been argued that it is 'unreasonable to expect communities to enforce restrictions unaided' and that a complementary model which encompasses both community control and statutory control is the preferable way to deal with alcohol restrictions in Aboriginal communities.¹⁵⁷ Other parts of Australia have implemented strategies which operate under general liquor licensing laws. In the Northern Territory, the liquor licensing authority has the power to declare a specific area of land to be a restricted area where alcohol is not permitted.¹⁵⁸ For some time in Queensland, several Aboriginal communities have had canteens which are permitted to sell alcohol. Legislation was enacted in 2002 to establish Community Liquor Licence Boards to control these canteens. The boards are generally required to take into account the recommendations of a community justice group in relation to the conditions of sale of alcohol in the community.¹⁵⁹ Community justice groups also have a pivotal role in relation to decisions

and destroy volatile substances and to take people to approved safe places. It is anticipated that authorised officers would include Elders, patrollers and other community members and that a safe place could be, for example, an outstation. The legislation provides that authorised officers would be permitted to exercise their powers in a specified area. See <http://www.nt.gov.au/justice/ocp/docs/forums/yj_forum/Volatile_Substance_Abuse_Factsheet_May05.pdf>. At the time of writing, this legislation had not yet commenced operation.

148. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (Canberra, 2005) 8.10.

149. Putt J, Payne J & Milner L, 'Indigenous Male Offending and Substance Abuse' (2005) 293 *Trends and Issues in Criminal Justice* 4. In this study it was found that 69 per cent of Indigenous male prisoners and 43 per cent of Indigenous male police detainees had used alcohol at the time of arrest or at the time of the offence, compared with 27 per cent for non-Indigenous prisoners and 28 per cent for non-Indigenous detainees.

150. This is three times the rate for non-Indigenous homicides: see Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2005 Report* (Canberra, 2005) 8.11.

151. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 17.

152. Apart from those communities which have strict prohibition and the Bindi Bindi Aboriginal Community By-Laws 2001, by-law 7 which provides for the use of alcohol on land used for private residential purposes, all of the remaining 19 communities have a by-law which provides that the community council has the discretion to grant permission to a person to use or possess alcohol on their community lands.

153. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 18.

154. See Part II, above p 26.

155. The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 117.

156. Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key indicators 2005 report* (Canberra, 2005) 8.12.

157. D'Abbs P, 'Restricted Areas and Aboriginal Drinking' (Paper presented at the Australian Institute of Criminology Conference, 1990) 13: see <<http://www.aic.gov.au/Publications/proceedings/01/Dabbs.html>>.

158. *Liquor Act 1980* (NT) ss 74, 75. The process involves hearings and the requirement to consider the wishes of residents in the area concerned.

159. *Indigenous Communities Liquor Licences Act 2002* (Qld) ss 7 & 8.

to prohibit or restrict alcohol use in their communities. A community justice group can make recommendations to the Minister who oversees the *Liquor Act 1992* (Qld) in relation to restrictions and, if such restrictions are imposed, it is an offence to consume or possess alcohol in contravention of the restrictions. Enforcement is the responsibility of police and liquor licensing investigators. A restriction may involve a zero limit or a specified limit indicating the amount and type of alcohol allowed. Community justice groups also have the legislative power to declare a public area in their community to be a dry place and may also do so for a private area (such as houses or lands controlled by traditional owners) with the consent of the resident or private owner.¹⁶⁰

It is the Commission's view that any legislative prohibition or restriction of alcohol in Western Australian Aboriginal communities should be dealt with under the *Liquor Licensing Act 1988* (WA). The liquor licensing authority has already imposed restrictions on the availability of certain types of alcohol and the circumstances in which it is sold at a number of regional locations where social problems associated with the consumption of alcohol have dictated intervention.¹⁶¹ The Commission considers that the prohibition and restriction of alcohol within Aboriginal communities or in locations where a large number of Aboriginal people reside should be administered by the one authority that has the expertise to provide assistance.

A recent review of the *Liquor Licensing Act 1988* (WA) recommended that the Director-General of the Department of Indigenous Affairs should be able to apply to the licensing authority for regulations to support restrictions proposed¹⁶² by a community under the *Aboriginal Communities Act 1979* (WA). The regulations would create offences and provide penalties for breaching the provisions.¹⁶³ In other words, provisions similar to those that currently appear in

Aboriginal community by-laws could be included in the *Liquor Licensing Regulations 1989* (WA) with enforcement of breaches being the responsibility of police. An added bonus of this approach is that there can be no argument about the application of these laws to all people who may be present at an Aboriginal community. It does not matter whether the person is Aboriginal or non-Aboriginal or whether the person is a resident member of the community. The Commission supports this recommendation as long as there is a mechanism to ensure that any restriction has the support of the relevant Aboriginal community.

Proposal 16

That the Director-General of the Department of Indigenous Affairs be given the power to apply to the liquor licensing authority for regulations in relation to the restriction or prohibition of alcohol on behalf of a discrete Aboriginal community which has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. An application should only be made after it has been established that the majority of the community members support the application. The regulations should provide that breaching the restrictions or prohibition imposed is an offence.

The Commission also supports the recommendations in the review of *Liquor Licensing Act 1988* (WA) that there should be an additional offence under the legislation in relation to the illegal sale of liquor to Aboriginal communities with strong deterrent penalties.¹⁶⁴ The Commission acknowledges a recommendation to an earlier review of the legislation in 1994, that transportation of alcohol into dry Aboriginal communities should be prohibited.¹⁶⁵ The Commission is of the view that it should be an offence for a person

160. See <<http://www.mcmc.qld.gov.au/community/restricted.php>>.

161. The licensing authority has the power to impose conditions under s 64 of the *Liquor Licensing Act 1988* (WA) and this power has been invoked in Halls Creek, Mount Magnet, Onslow, Nullagine, Derby, Newman, Port Hedland, South Hedland and Meekatharra: see Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76. Note also that this approach was supported by Aboriginal people during the consultation at Laverton: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 17.

162. In this regard the Commission notes that it is vital that any prohibition or restriction to the use of alcohol is only imposed with the support of the community. If not, a prohibition may infringe the *Racial Discrimination Act 1975* (Cth): see Calma T, Acting Race Discrimination Commissioner and Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Implications of the Racial Discrimination Act 1975 with Reference to State and Territory Liquor Licensing Legislation' (Paper presented at the 34th Australasian Liquor Licensing Authorities' Conference, Hobart, 26–29 October 2004). See also the discussion in Part IV 'Recognition of Customary Law and the Principle of Equality', above p 72.

163. Independent Review Committee, *Liquor Licensing Act 1988: Report of the Independent Review Committee* (Perth, May 2005) 76–77.

164. Ibid 76. Note that s 109 of the *Liquor Licensing Act 1988* (WA) creates an offence for selling liquor without a licence or a permit and the maximum penalty is a \$10,000 fine.

165. Gray D, Drandich M, Moore L, Wilkes T, Riley R & Davies S, 'Aboriginal Wellbeing and Liquor Licensing Legislation in Western Australia' in Gray D & Siggers S (eds), *Indigenous Australian Alcohol and Other Drug Issues: Research From the National Drug Research Institute* (Perth: National Drug Research Institute, Curtin University, 2002) 5, 48. See also McCallum's comments that it was well-known that taxi drivers performed 'grog-runs' in the Kimberley and because they did not necessarily enter the community lands the by-laws were ineffective in dealing with this problem: McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Perth: Aboriginal Affairs Planning Authority, July 1992) 22.

to sell or supply alcohol to a person in an Aboriginal community where that person knows that the community has prohibited the use of alcohol.

Proposal 17

That the *Liquor Licensing Act 1988* (WA) be amended to provide that it is an offence to sell or supply liquor to a person in circumstances where the person selling or supplying the liquor knows, or where it is reasonable to suspect, that the liquor will be taken into an Aboriginal community which has prohibited the consumption of liquor under the *Liquor Licensing Regulations 1989* (WA).

The Commission emphasises that an Aboriginal community would be able to implement their own initiatives to control alcohol use through the community justice groups proposed by the Commission. There is no reason why a community justice group could not declare their community or part of their community to be a dry place or otherwise impose restrictions upon the amount and type of alcohol permitted under their community rules. In time it may be appropriate for the liquor licensing legislation to empower community justice groups to establish dry areas as has occurred in Queensland; however, it should be noted that community justice groups in Queensland had been operating for a number of years prior to the enactment of those provisions. The focus in Western Australia at this stage should be on the establishment of, and capacity building for, community justice groups.

Community Justice Mechanisms in Other Australian Jurisdictions

Queensland

Unlike Western Australia, Aboriginal community justice mechanisms in Queensland are formally recognised within the criminal justice system. Instead of individual government departments providing funding and support for a variety of local initiatives, the Department

of Aboriginal and Torres Strait Islander Policy and Development oversees the establishment and funding of community justice groups throughout Queensland and these, in turn, develop their own methods and structures to tackle local justice issues.

The Queensland Aboriginal and Torres Strait Islander Justice Agreement 2000 aims to reduce the over-representation of Aboriginal people in the criminal justice system and improve the standard of living for Aboriginal and Torres Strait Islander people. The agreement is a partnership between a number of government agencies and Aboriginal communities and organisations; community justice groups are just one aspect of the overall agreement.¹⁶⁶

Queensland community justice groups

The operation of community justice groups

The first community justice group was established in 1994 after extensive consultations with the Kowanyama community and was, at that time, funded by the Queensland Corrective Services Commission. The Kowanyama Community Justice Group (KCJG) commenced with 18 members comprising three men and three women from each of the local family groups.¹⁶⁷ Currently there are over 30 community justice groups in remote, rural and urban communities in Queensland funded through the Local Justice Initiatives Program under the control of Department of Aboriginal and Torres Strait Islander Policy and Development.

An interim assessment found that community justice groups were 'developing innovative and successful strategies for tackling community justice issues by working within the formal justice system and within the community itself'.¹⁶⁸ An evaluation of the KCJG found that there had been a significant reduction in juvenile crime which was in part attributable to activities of the group such as their 'kids and cops' program. This program involved local police recruiting young people as honorary police to assist in evening patrols. The reduction in juvenile crime was also the result of the group working with the community council to

166. See *Queensland and Torres Strait Islander Justice Agreement* (July 2001) 16–17 Summary.

167. Chantrill P, *The Kowanyama Justice Group: A study of the achievements and constraints on local justice administration in a remote Aboriginal community* (Australian Institute of Criminology Occasional Seminars, 1997) 7: see <<http://www.aic.gov.au/conferences/occasional/chantrill.html>>.

168. Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 46–47: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>>. In their background paper Chris Cunneen and Melanie Schwartz note that the evaluations of community justice groups in Queensland have shown that they reduce juvenile crime and truancy; reduce family and community disputes and violence; lead to more effective use of police and judicial discretion; increase the self-esteem and empowerment of communities; provide better support for offenders in the community; and result in cost savings in the area of criminal justice: see Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 34–35.

establish sport and recreational activities.¹⁶⁹ Some of the successful strategies used by community justice groups in Queensland are:

- encouraging police to divert matters to the community justice group;
- assisting with supervision and support of offenders while on bail or subject to community-based orders or parole;
- developing diversionary alternatives such as outstations and cultural programs;
- visiting prisons;
- conducting night patrols;
- organising recreational and cultural activities for young people;
- counselling and mediation; and
- use of shaming by Elders.¹⁷⁰

The interim assessment also found that community justice groups empowered their local community and that 'a strong theme in the activities of community justice groups is a desire to strengthen language, culture and customary law in their communities in order to restore a sense of cultural identity and high self esteem'.¹⁷¹ For example, the KCJG Elders used forms of control such as:

- avoiding people or not making them welcome at particular homes;
- forbidding access to the community canteen;
- asking people to leave the community for varying periods of time;
- promoting reconciliation by bringing problems out into the open and holding meetings; and
- growling and shaming to promote socially acceptable behaviour.¹⁷²

The success of various community justice groups in Queensland is largely attributable to the cultural authority which the groups exert based on representation from all local family groups.¹⁷³ In relation to the Coen Local Justice Group it has been stated that:

The composition of the Justice Group is a reflection of the traditional Indigenous authority structure within the area and is a genuine attempt at reinvigorating past methods of social control within the clan groups for the benefit of the community.¹⁷⁴

The one problem area that had been identified in relation to the KCJG, as well as community justice groups in Queensland generally, concerns the abuse of alcohol and related violence. In many communities the sale of alcohol is controlled by a community canteen. Conflict of interest problems arose because profits of the community canteen went to the community council (and some members of the council were also members of the justice group).¹⁷⁵ More recently, the Queensland government has endeavoured to address this issue through separate legislation dealing with the sale and management of alcohol in Aboriginal communities as well as providing for statutory recognition of the activities of community justice groups in relation to the management of alcohol and their involvement within the formal justice system.¹⁷⁶

Legislative basis of Queensland community justice groups

Community justice groups are established under the *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) which provides that the functions of a community justice group include the regulation of the possession and consumption of alcohol, carrying out local strategies to address justice issues affecting

169. Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 46–47: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>> 15. See also Chantrill P, *Community Justice in Indigenous Communities in Queensland: Prospects for keeping young people out of detention* [1998] *Australian Indigenous Law Reporter* 18, 2–3, where similar observations were made in relation to the Palm Island Community Justice Group.

170. Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 44–48: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>>.

171. *Ibid* 48.

172. Chantrill P, *The Kowanyama Justice Group: A study of the achievements and constraints on local justice administration in a remote Aboriginal community* (Australian Institute of Criminology Occasional Seminars, 1997) 14: see <<http://www.aic.gov.au/conferences/occasional/chantrill.html>>.

173. Wright H, 'Hand in Hand to a Safer Future: Indigenous family violence and community justice groups' (2004) 6(1) *Indigenous Law Bulletin* 17.

174. Kristiansen KMS & Irving M, *The Coen Local Justice Group – A Community Response to Family Violence in Queensland through the Local Justice Initiatives Program* (2001) 5(13) *Indigenous Law Bulletin* 12.

175. Chantrill P, *The Kowanyama Justice Group: A study of the achievements and constraints on local justice administration in a remote Aboriginal community*, Australian Institute of Criminology, Occasional Paper (1997) 19: see <<http://www.aic.gov.au/conferences/occasional/chantrill.html>>. See also Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001) 48: see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>>.

176. *The Indigenous Communities Liquor Licences Act 2002* (Qld) provides for the establishment of Community Liquor Licence Boards to manage canteens and members of this board cannot also be members of the community council. The Community Liquor Licence Board is required to implement any recommendations about the sale and management of alcohol which are made by the Community Justice Group unless it considers that the recommendations are not in the interests of the community.

members of the community, and making recommendations to the Community Liquor Licence Board.¹⁷⁷ The composition and rules of individual community justice groups are established through regulations; however, there is a legislative requirement that the membership of a community justice group must include at least one representative of each of the main indigenous social groupings in the area and each community justice group must appoint a coordinator.¹⁷⁸

Importantly, in terms of the involvement of community justice groups within the general criminal justice system, statutory requirements to take into account the views of community justice groups were introduced in 2000. Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that when sentencing an offender that is an Aboriginal or Torres Strait Islander person the court *must* have regard to any submissions made by a representative of the community justice group that are relevant to sentencing.¹⁷⁹

Northern Territory

Aboriginal Law and Justice Strategy

The Northern Territory's Aboriginal Law and Justice Strategy commenced in 1995 and is designed to provide a 'whole-of-government' approach to Aboriginal law and justice issues at the Territory, regional and community levels. A primary focus of the strategy is the development of community law and justice plans.¹⁸⁰ The objectives of community law and justice plans include increasing 'Aboriginal participation in the law and justice process through an appropriate local structure using local organisations'.¹⁸¹ Law and justice plans have already been developed in some

communities¹⁸² and the NTLRC has recommended further development of law and justice plans and for these plans to incorporate Aboriginal customary law as a method of dealing with issues within the community.¹⁸³ A typical Law and Justice Committee has a 'dual role': a formal role within the criminal justice system and an informal role in community dispute resolution.¹⁸⁴

Example of a Northern Territory law and justice plan

The Lajamanu Community Law and Justice Plan ('the Plan') which commenced in November 2000 is an agreement entered into between a number of community groups¹⁸⁵ and government departments. It was developed after a series of community meetings and workshops with community members and organisations. One of the main community groups involved in the Plan is the Lajamanu Tribal Council. There are approximately 35 members drawn from the four male and four female skin groupings in the area.¹⁸⁶

The Tribal Council is not a formally organised Council with clearly defined functions. It draws its authority from the status and seniority of its individual skin group leaders. The Tribal Council or more accurately members with a vested interest in specific issues will come together to resolve certain issues. Membership is therefore not static and different groups of people are called on to address different matters.¹⁸⁷

The Plan anticipates that when an offence or dispute occurs the matter will initially be resolved by the community (for example, through the Tribal Council or the Law and Order Committee). The matter will only be referred to the police when: the victim wishes it to; the police consider that the welfare or safety of the victim is at risk; or the matter requires mandatory reporting. The Plan clearly requires support from the

177. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 87.

178. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) ss 88 & 90; and see *Aboriginal Communities (Justice and Land Matters) Regulations 1998*.

179. Note also that s 109(1)(g) of the *Juvenile Justice Act 1992* (Qld) has a similar provision. Similarly, s 15 of the *Bail Act 1980* (Qld) provides that the views of a community justice group may be considered during an application for bail.

180. Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, *A Model for Social Change: The Northern Territory's Aboriginal Law and Justice Strategy* (1995–2001) 7.

181. *Ibid.*

182. For example, the Ali Curung, Lajamanu and Yuendumu communities have established their own Law and Justice Committees and the Kurduju Committee comprises representatives from each of these communities to provide a 'forum for the proper documentation and recording of remote community initiatives'. See Ali Curung, Lajamanu and Yuendumu Law and Justice Committees, *The Kurduju Committee Report* (Vol. 1, December 2001) 7.

183. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 22.

184. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 18.

185. Examples of the community organisations which are involved in the law and justice plan are Women's Safe House Management Committee, the Wulain Outstation Resource Centre, the Lajamanu Night Patrol and the Lajamanu Community Government Council. See Department of Community Development, Sport and Cultural Affairs, Northern Territory Government, *A Model for Social Change: The Northern Territory's Aboriginal law and justice strategy* (1995–2001) 52–53.

186. Department of Community Development, *ibid* 52.

187. *Ibid.*

police as it is proposed that when an incident occurs the police will meet with representatives from the Tribal Council and other groups. Subject to the above constraints, this meeting will determine whether the matter is dealt with by the police, the Tribal Council or another group, or is referred to a community diversionary program.¹⁸⁸ The advantages of this model, and of the community justice groups in Queensland, is the empowerment of communities to be involved in decision-making processes, to make use of customary methods for dealing with disputes and offences, and to divert Aboriginal people away from the formal criminal justice system. What the Northern Territory scheme lacks is the statutory recognition of the local justice structures and the requirement for courts to consider the views of these groups when dealing with matters concerning sentencing or bail.

New South Wales

New South Wales Aboriginal Justice Agreement

The New South Wales Aboriginal Justice Agreement entered into in 2002 is a partnership between the New South Wales Attorney-General and the Aboriginal Justice Advisory Council. Like its counterparts in other states it aims to reduce the level of contact between Aboriginal people and the criminal justice system and improve community safety for Aboriginal people in New South Wales. Specifically the agreement was designed to implement an Aboriginal Justice Plan.¹⁸⁹ The Aboriginal Justice Plan was entered into in 2004 and is to operate for 10 years.¹⁹⁰

New South Wales community justice groups

One important initiative that has been supported by the New South Wales Aboriginal Justice Agreement and the Aboriginal Justice Plan is the establishment of community justice groups. Community justice groups in New South Wales are described as 'local groups of Aboriginal people who come together to develop ways

to solve local law and justice problems' and work in cooperation with justice agencies as well as developing local crime prevention programs.¹⁹¹ In addition to the expansion of community justice groups, the Aboriginal Justice Plan supports a number of other community justice mechanisms such as Aboriginal community patrols and diversionary programs, including conferencing and community-managed outstation facilities.¹⁹² The only legislative recognition of community justice groups in New South Wales is in relation to circle sentencing. The Minister may appoint a community justice group for each court which participates in circle sentencing and the main function of the community justice group is to assess offenders for inclusion in the circle sentencing program.¹⁹³

Victoria

Victorian Aboriginal Justice Agreement

The Victorian Aboriginal Justice Agreement was entered into in 2000 and aims to improve justice outcomes for Aboriginal people in Victoria by developing a statewide action plan and then developing regional Aboriginal justice plans.¹⁹⁴ The Agreement recognises that the best practice interventions since the RCIADIC involve 'the Aboriginal community's participation in their development, ownership and implementation'.¹⁹⁵ The agreement also recommended a review of Aboriginal community justice panels which were already operating throughout Victoria.¹⁹⁶

Aboriginal Community Justice Panel Program

Community Justice Panels commenced in Victoria in 1988 as a result of the recommendations of the RCIADIC. They were initially administered by the Victorian Aboriginal Legal Service; however, they are now under the umbrella of the Victorian Police Service.¹⁹⁷ The main role of community justice panels is to ensure the safety of Aboriginal people in police custody and to assist Aboriginal people after they leave custody.¹⁹⁸ However,

188. Ibid 54–55, and note that a community diversionary program may include a fine, banishment, restitution, removal of the offender to an outstation or ceremony camp, community service or such other punishment as is determined by the Tribal Council or other groups.

189. *New South Wales Aboriginal Justice Agreement* (2002).

190. New South Wales Aboriginal Justice Advisory Council, *New South Wales Aboriginal Justice Plan: Beyond justice* (2004–2014).

191. See <<http://www.lawlink.nsw.gov.au/cpd.nsf/pages/communityjustice>>.

192. Cunneen C, *NSW Aboriginal Justice Plan: Discussion paper* (Sydney: Aboriginal Justice Advisory Council, August 2002) 42–48.

193. *Criminal Procedure Regulation 2000* (NSW) sch 3. For a more detailed discussion of circle sentencing in New South Wales, see 'Aboriginal Courts', below pp 142–57.

194. *Victorian Aboriginal Justice Agreement* (2000) 23.

195. Ibid 16.

196. Ibid 42.

197. Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel: Final report* (2001) 16.

198. See <http://www.police.vic.gov.au/files/documents/424_Aboriginal_Community_Justice_Panels.pdf>.

in practice, these panels have become involved in emergency and welfare services.¹⁹⁹ The review of the panels pursuant to the Aboriginal Justice Agreement recommended that community justice panels should be adequately resourced to become more involved in crime prevention and diversionary strategies.

South Australia

Consistent with the current nationwide experience of governments entering into partnerships with Aboriginal communities, the South Australian government developed the 'Doing it Right' policy in 2003 and established a high level Indigenous Advisory Council to oversee its implementation. Apart from the Minister for Aboriginal Affairs the membership of this council is entirely Indigenous.²⁰⁰ Specifically in relation to justice issues, the Aboriginal Justice Vision Statement aims, amongst other things, to establish regional Aboriginal justice plans. The Aboriginal Justice Consultative Committee which was set up in January 2002 is comprised of both Aboriginal stakeholders and government agencies and it will be involved in this process.²⁰¹ Specific Aboriginal community justice mechanisms such as family violence programs and patrols have been operating successfully in South Australia for some.²⁰²

Key Principles for Effective Community Justice Mechanisms

After examining the current situation with respect to Aboriginal community justice mechanisms throughout Australia, as well as government policies related to the participation of Aboriginal people in the criminal justice system, the Commission considers that the following key principles are essential components to any proposal in this area.

Partnerships

From the above overview of Aboriginal community justice mechanisms, coupled with the acknowledgment that the general criminal justice system has systematically failed Aboriginal people, it is clear that the key to success is for Aboriginal people to determine their own ways of dealing with justice issues in their communities. This is consistent with the current government policy of entering into partnerships with Aboriginal people and communities because:

The notion of partnership is a critical one for furthering community involvement in justice administration. Self-determination does not imply that communities must undertake all tasks alone.²⁰³

As Blagg has stated, it is necessary to allow Aboriginal communities to 'define the issues for themselves and then work in partnership with government agencies to implement strategies'.²⁰⁴ This directly relates to the need to assist Aboriginal communities in developing their capacity to deal with justice issues on their own terms.

Capacity Building

In general capacity building refers to the strengthening of resources, skills, values and relationships in order to achieve desired outcomes.²⁰⁵ The Commission considers that in the area of criminal justice the issue of capacity building is twofold. First, a particular Aboriginal community must be supported by a whole-of-government approach by ensuring that the appropriate structures and services are in place to allow that community to deal with justice and social issues in a meaningful and sustainable way.²⁰⁶ (For example, Blagg makes reference in his background paper to the Jigalong community which had wanted to establish an outstation program for some time; however, government agencies saw this option as too costly and did not support the

199. Victorian Aboriginal Justice Agreement (2000) 42.

200. South Australian Department for Aboriginal Affairs and Reconciliation, *Doing it Right* (May 2003) 16.

201. See <<http://www.justice.sa.gov.au/aboriginal.htm>>.

202. Blagg H & Valuri G, *An Overview of Night Patrol Services in Australia* (Commonwealth Attorney-General's Department, 2003) 72–76; and see generally Cunneen C, *The Impact of Crime Prevention on Aboriginal Communities* (Sydney: New South Wales Aboriginal Justice Advisory Council, September 2001): see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports/>> for a discussion of various programs.

203. Chantrill P, *Community Justice in Indigenous Communities in Queensland: Prospects for keeping young people out of detention* (1998) 3 *Australian Indigenous Law Reporter* 163, 176.

204. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13–14.

205. See discussion in Part X 'Capacity Building and Governance', below p 426.

206. The Lingjari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 9. See the Commission's Proposal 1, above p 44, dealing with a whole-of-government approach to service delivery for Indigenous communities.

community's proposal).²⁰⁷ Considerations of cost need to be viewed against the saving in other areas such as the cost of imprisoning or detaining a person in custody. The second way that capacity building is enhanced is through the establishment and development of community justice mechanisms. The Commission believes that community justice groups have the strong potential to enhance the capacity of communities to self-govern: as has been noted by Blagg, law and justice structures are 'prerequisites for the development of healthy communities'.²⁰⁸

Consultation and Planning

In order for any community justice mechanism to be successful, community consultation is imperative. Inadequate consultation and 'poor establishment practices' lead to what had been described as a 'cycle of failure'.²⁰⁹ In particular, it is vital for relevant agencies to ensure that the consultation is designed to determine what the particular community wants rather than to illicit consent for a proposal that has already been planned.²¹⁰ At the same time the Commission notes that there is a danger in continued consultation with Aboriginal communities which does not result in any meaningful changes.²¹¹

In formulating its proposal for community justice groups in Western Australia the Commission has aimed to achieve a balance between taking into account the views expressed to it during its consultations with Aboriginal communities and proposing a model which guarantees the need for further consultation to ensure that local views are taken into account. In other words, the Commission's proposal is designed to achieve real and practical improvements to justice outcomes for Aboriginal people but, at the same time it has sufficient flexibility to allow its application to individual communities based upon their specific views and requirements.

Cultural Authority

The Commission's consultations showed that many Aboriginal communities support the vital role of Elders

and experience suggests that the most successful strategies (such as the community justice groups in Queensland) hinge on the cultural authority of Elders in their respective communities. As stated in the Munjurla Study:

We would do well to remember that the kinship system and the system of customary law succeeded in maintaining social order in this region for thousands of years until very recent times.²¹²

It is the Commission's view that its proposal for community justice groups not only recognises the cultural authority of Elders in Aboriginal communities, but also will assist in the restoration of that authority where it may have broken down.

Formal Recognition within the Criminal Justice System

The Commission supports the formal recognition of community justice groups within the criminal justice system in a similar way to the method of recognition in Queensland. Many of the issues discussed in this Part regarding the way in which courts should be informed of and take into account Aboriginal customary law and culture, can be overcome by a provision which requires a court to consider information about such matters from a community justice group.²¹³ The statutory recognition of community justice groups will enable courts and police to divert Aboriginal people away from the criminal justice system and allow them, when appropriate, to be dealt with by their own community and pursuant to Aboriginal customary law.

Recognition of Aboriginal Customary Law

It is clear that the criminal justice system to date has been ineffective in dealing with offences committed by Aboriginal people, especially where those offences occur in an Aboriginal community.

Aboriginal customary law may provide a more effective way of dealing with Aboriginal offenders, solving victim

207. Ibid 22.

208. Ibid 40.

209. Ibid 16.

210. Ibid 40.

211. In this regard the Commission notes comments by the team which reviewed the Victorian Community Justice Panel scheme that 'over-consultation' can be problematic when the 'consultation process does not appear to achieve any particular outcome for the community consulted': see Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel: Final report* (2001) 22.

212. The Lingiari Foundation, *The Munjurla Study: A scoping, profiling and planning process in respect of the WA COAG site trial for the purposes of informing the negotiation of a comprehensive regional agreement* (April 2004) 114.

213. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', below pp 221–24, where the Commission emphasises problems, such as false claims, that arise when information about customary law is presented without adequate corroboration from Aboriginal people. Another problem is that without direct information from relevant Aboriginal people, customary law issues run the risk of being overlooked.

issues and providing a means for resolving any disputes within the community that may have arisen as a result of the offence or that may be an underlying cause of the offence.²¹⁴

The Commission considers that the proposal for community justice groups provides a space for the functional recognition of Aboriginal customary law.²¹⁵ The proposal avoids the problems associated with any attempt to codify or write down aspects of Aboriginal customary law.²¹⁶ Most Aboriginal people consulted for this reference did not support the codification of customary law because of the fear that 'Aboriginal law would inevitably be appropriated by the white man's law if written down, classified and codified (these being essentially non-Aboriginal practices).²¹⁷

The Commission's Proposal for Community Justice Groups

Establishment of Community Justice Groups

The Commission is of the view that the *Aboriginal Communities Act 1979* (WA) should be repealed and new legislation (the 'Aboriginal Communities and Community Justice Groups Act') should be enacted to provide for the establishment of community justice groups. Aboriginal communities that are currently declared under *Aboriginal Communities Act* should be deemed to be declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. The Commission considers that this new legislation should distinguish between discrete Aboriginal communities (in other words, the type of communities which the *Aboriginal Communities Act* currently covers) and other Aboriginal communities that are not discrete, such as those in metropolitan areas or in close proximity to regional centres. Discrete Aboriginal communities are those communities which have identifiable physical

boundaries. Discrete Aboriginal communities would be able to set their own community rules and community sanctions (in addition to performing a number of functions within the general criminal justice system). Non-discrete Aboriginal communities would be able to undertake the same roles within the criminal justice system as discrete Aboriginal communities but would not have the facility to create community rules and sanctions.

An Aboriginal Justice Advisory Council (AJAC) with members from both the Aboriginal community and government departments should be established to advise and support communities in relation to the option of establishing a community justice group. The Commission notes that some Indigenous advisory bodies are entirely constituted by Indigenous people. However, in line with the need to assist Aboriginal communities to build their capacity to manage their own affairs with limited external interference, the Commission is of the view that an AJAC in Western Australia should have the benefit of the expertise of relevant government departments. Where possible the government representatives on the AJAC should be Aboriginal and have longstanding experience in Aboriginal issues that affect their portfolio. The AJAC would then assist any community who wished to set up a community justice group by holding community consultations; assisting with the identification of the relevant family, social or skin groups within the community; and providing advice on preparation of the application to the Minister. The current Indigenous Affairs Advisory Council is not considered to be the appropriate advisory body as it is described as the primary adviser *to government*. The proposed AJAC should be focused on justice issues and should act as an adviser *to Aboriginal communities*.

The Commission acknowledges the work that is currently being undertaken with respect to the Aboriginal Justice Agreement and the development of regional and local justice plans and is of the view that

214. Aboriginal Justice Advisory Council *Strengthening Community Justice: Some Issues in the Recognition of Aboriginal Customary Law in New South Wales* (undated) 7: see <[http://www.lawlink.nsw.gov.au/ajac.nsf/pages/discussion papers](http://www.lawlink.nsw.gov.au/ajac.nsf/pages/discussion%20papers)>.

215. Chris Cunneen and Melanie Schwartz argue that Aboriginal justice mechanisms are not primarily about the recognition of customary law but rather allow Aboriginal communities to apply their own laws within a 'negotiated relationship to state institutions'. In this discussion Cunneen and Schwartz considered Aboriginal courts, circle sentencing, community justice groups and patrols. See Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some conceptual issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 32. The Commission has separated the discussion of Aboriginal courts (including circle sentencing) from the discussion about Aboriginal community justice mechanisms because it considers that the former are not specifically about the recognition of Aboriginal customary law while the latter—in particular the Commission's proposal for community justice groups—provide an appropriate space for recognising Aboriginal customary law. This does not mean that community justice groups will be restricted to only applying Aboriginal customary law. The Commission's proposal envisages that community justice groups can determine community rules and sanctions on their own terms. Of course this must be subject to Australian law – a matter that the terms of reference for this project clearly require.

216. For further discussion of the reasons why the Commission does not support codification of Aboriginal customary law, see Part III 'Codification', above p 62.

217. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13–14.

this proposal can operate in tandem with the current arrangements. Groups and government agencies that are working towards these local plans should be involved with the consultations in the communities and providing support for a community who wishes to establish a community justice group. The AJAC would be able to coordinate all relevant groups for this purpose.

The Commission considers that it is necessary for community justice groups to be formally established because of the proposed roles that the groups would have within the justice system. The success of the state's recognition of Aboriginal customary law in the criminal justice system will depend heavily on the ability of courts to access the expertise, community and customary law knowledge and proposed functions of the community justice groups.

Discrete Aboriginal communities

For discrete Aboriginal communities which are not currently covered by the *Aboriginal Communities Act*, those who wish to establish a community justice group will need to be declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'. In order to ensure that this proposal can be implemented as quickly as possible the Commission recommends that the Minister for Indigenous Affairs have the power to declare a community to be a community to which the 'Aboriginal Communities and Community Justice Groups Act' applies. The legislation should provide that the Minister is to declare a discrete community if he or she is satisfied that there is provision for adequate consultation between the community members and a community justice group, especially in relation to the determination of community rules and sanctions. Once declared under the 'Aboriginal Communities and Community Justice Groups Act', a discrete Aboriginal community would be able to apply to the Minister for Indigenous Affairs for approval of their community justice group.

Most discrete communities occupy land pursuant to a crown lease or a pastoral lease. For these communities, the Commission is proposing that there should be a general definition to the effect that in these cases the community lands are the entire reserve area or pastoral

lease, whichever is applicable. This will be relevant not only for the establishment of community justice groups, but also for other legislation (discussed above) which refers to Aboriginal communities which have been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act'.²¹⁸ The Commission anticipates that there may be some discrete Aboriginal communities that occupy land without any formal agreement specifying the boundaries of the community and that these communities may wish to apply for approval of a community justice group. In this situation the 'Aboriginal Communities and Community Justice Groups Act' should provide for the Minister to declare the boundaries of the particular community by giving notice in the Gazette.

Non-discrete Aboriginal communities

The Commission proposes that non-discrete Aboriginal communities may also establish a community justice group under the new legislation to undertake a formal role within the criminal justice system. However, the functions of community justice groups in non-discrete communities cannot formally include the establishment of community rules and sanctions. The concept of community rules and sanctions envisages that members of the community will voluntarily abide by the sanctions that are agreed upon and, if sanctions are not followed, the community has the option to request that a member of the community leave for a specified time.²¹⁹ For non-discrete Aboriginal communities, where there are no defined boundaries, this would not be possible.

Membership

The nature of the membership of a community justice group is fundamental to the success of the scheme. In Queensland the legislation requires that there must be at least one representative from each of the main Indigenous social groupings in the area and the members must be of a good standing in the community.²²⁰ Indigenous social grouping is defined as:

A group of Indigenous persons sharing a common basis of social affiliation, including family relationship, language, traditional land ownership and historical association.²²¹

218. See Proposal 12 in relation to disorderly behaviour; Proposal 13 in relation to the definition of driving; Proposal 15 in relation to the *Protective Custody Act 2000* (WA), and Proposal 16 in relation to the *Liquor Licensing Act 1988* (WA).

219. See discussion under 'Trespass', above pp 122–23.

220. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 88.

221. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 88(5).



Although in a different context, the success of Aboriginal working groups, which currently operate in Western Australia with respect to native title and land administration issues, has been attributed to their legitimate representative structure.²²² There are currently about 30 working groups in the Murchison/Gascoyne and Pilbara regions and each group has between 12 and 16 members.²²³ Members are 'nominated and authorised by traditional societies at native title community meetings' and, once formed, the working group is empowered to make decisions in relation to native title and land administration on behalf of the traditional community.²²⁴ The authority of the group is limited to specific areas and places pursuant to the boundaries of the native title community. Importantly, these working groups apply traditional decision-making procedures that are applicable to their respective communities.²²⁵ The working groups have been operating successfully for between four and eight years; they are a testament to the viability of Aboriginal community groups provided that any such group is truly representative of the community that it serves.

To secure similar legitimacy, the Commission is of the view that membership of a community justice group must be representative of the different family, social or skin groups within the relevant community. Each

family, social or skin group should be able to nominate an equal number of male and female members.²²⁶ It is expected that members of community justice groups would be Elders or respected members of family, social or skin groups and a process allowing each group to nominate the appropriate people ensures that the representatives have the support of their community. The Commission also considers that in order to safeguard the rights of Aboriginal women and children and to make sure, as stated by Wohlan, that there are 'proper mechanisms where Aboriginal women have a say in what is culturally sanctioned and acceptable behaviour within their communities',²²⁷ the membership of a community justice group must be comprised of an equal number of men and women.²²⁸ This will ensure that the community justice group has the cultural authority to be effective in dealing with justice issues at the community level and to support its role within the criminal justice system.

Criteria for approval

In making this proposal the Commission is concerned to avoid external interference in the establishment and operation of community justice groups. The intention is that each community can develop its own structures and processes to deal with social and justice issues in the community. The Commission emphasises that this

222. Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, 'Submission to the Aboriginal Customary Laws Reference' (18 August 2005) 2.

223. Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Yamatji Land and Sea Council, Pilbara Native Title Service, 'Working Group Service Delivery Model: A policy paper' (18 May 2005) 1.

224. Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, 'Submission to the Aboriginal Customary Laws Reference' (18 August 2005) 2.

225. Ibid.

226. In this regard the Commission notes the comment during the Regional Prisons Consultations that 'white man cannot elect Elders ... each person from each area knows who the Elders are': see <<http://www.lrc.justice.wa.gov.au/Aboriginal/Consultation%20summaries/Prisons.htm>>; LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 40 where it was stated that Elders must be appointed by the Aboriginal community itself; LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 6 where it was stated that white man cannot elect Elders; LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 7 where it was mentioned that there are some difficulties in identifying Elders and that family groups need to be identified and the families will identify the Elders; LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 18 where it was stated that 'rightful leaders' are defined/nominated/elected by their own families.

227. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 47.

228. In this regard the Commission notes that in Queensland membership has included both men and women but that for the most part there have been more women members of community justice groups than men: see Fitzgerald T, *Cape York Justice Study* (Brisbane: Department of the Premier and Cabinet, 2001) 15.

is a proposal only and that its success hinges upon community initiative and acceptance. For this reason, the only legislative criteria for approval of a community justice group are:

- That the rules in relation to the membership of the group provide for equal representation of all relevant family, social or skin groups in the community and equal representation of both men and women.
- That there has been adequate consultation with the members of the community and that a majority of the community members support the establishment of a community justice group.

The Commission considers that these criteria are necessary in order to ensure that Aboriginal women are protected and to reduce the chances of one dominant group within a community determining the outcome.

Roles of the Community Justice Group

Community rules and sanctions

A community justice group in a discrete Aboriginal community (that is, a community that has been declared under the proposed 'Aboriginal Communities and Community Justice Groups Act') would be able to set community rules and community sanctions. Consistent with the aim of facilitating the highest degree of autonomy possible, there should be no limit on the types of matters that are considered, other than the constraints of Australian law. In other words, a community would not be able to have a sanction that involved inflicting physical punishment which amounted to an offence under the criminal law. Nor would it be able to impose a sanction which involved the unlawful detention of a person. The Commission considers that the success of any particular group will depend primarily on the cultural authority it exerts and the support for

the establishment of community rules and sanctions within the community itself. Therefore, consent to undergo a particular sanction is necessarily implied in the model. If an Aboriginal person does not agree to comply with both the community rules and the community sanctions then the community has the power through its community council to refuse to allow that person to remain in the community for a specified period of time.²²⁹

To specify in the legislation exactly what sanctions a community justice group could impose would in the Commission's opinion unnecessarily restrict a community's ability to determine its own sanctions and might well involve the codification of Aboriginal customary law. As mentioned earlier, the Commission is mindful of the disempowerment of Aboriginal people that may result from such codification.²³⁰ The advantages of a flexible approach are that it allows each community to decide for themselves the rules and sanctions and allows the incorporation of matters that are offences against Australian law and offences against Aboriginal customary law. Of course, the rules could include matters which are neither general criminal offences nor offences against customary law, such as the consumption of alcohol and intoxicants.²³¹ Importantly it allows for community sanctions which take into account Aboriginal customary law punishment and processes. It has been observed in relation to Aboriginal community justice groups in Queensland that:

[C]ustomary law is as much about a process of governing social relations as it is about the content of rules and customs that might be considered to make up a body of law. Understood in this way, the challenge of recognising customary law can be seen as the challenge of empowering customary processes or mechanisms by which indigenous communities can maintain social order.²³²

For the purposes of illustration, *community rules* could include rules that prohibit violence, alcohol and volatile substances and culturally offensive behaviour.²³³

229. See Proposal 14, above p 123. The Commission notes that at the time of the McCallum Review in 1992 some communities were using banishment as a sanction for breaching by-law offences. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Vol. 2, July 1992).

230. For a fuller discussion of these issues see Part III 'Codification', above p 62.

231. In this regard the Commission acknowledges the view expressed by the ALRC that acceptance of Aboriginal controlled methods of dealing with issues should not necessarily be dependent upon whether it is perceived as a customary or traditional method: see ALRC, *Aboriginal Customary Law and Local Justice Mechanisms: Principles, Options and Proposals*, Research Paper No 11/12 (1984) 136. The Commission notes that during the McCallum Review the Beagle Bay community described itself as a European-style community and its members no longer followed traditional law. There is nothing in this proposal that would prevent this community from establishing a community justice group. See the summaries of consultations with 13 Kimberley communities accompanying the 1992 review of the scheme: McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Vol. 2, July 1992) 18.

232. Limerick M, 'Indigenous Community Justice Groups: the Queensland Experience' (2002) 80 *Reform* 15.

233. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 8 where there was a detailed discussion about the concern over culturally offensive behaviour that was 'deliberately disrespectful, insulting or offensive on matters of law, initiation or family' rather than 'white-fella type swearing'.

To specify in the legislation exactly what sanctions a community justice group could impose would in the Commission's opinion unnecessarily restrict a community's [autonomy].

Community rules may also be established to regulate traffic, to control domestic animals, to assist in the elimination of health risks (such as rules about waste disposal and litter), or to provide for off-limits areas pursuant to customary law. *Community sanctions* could include community work, compensation, shaming, community meetings, banishment, referral to outstations and referral to other local justice mechanisms such as healing centres, youth camps and bush trips. The difference between this approach and the current by-law scheme is that there is more flexibility and freedom to decide what matters can be included; that the rules which apply to all members of the community do not have to be restricted to community lands; and that Aboriginal customary law matters which are subject to secrecy can be included without the need for anything to be written down. It also allows each community to incorporate its own dispute resolution processes.²³⁴

Where a matter is both a breach of community rules and a breach of the general criminal law the alleged offender, the victim and the community justice group would choose whether the community justice group would deal with the matter or whether it would be referred to the police. Of course, the police would always have the power to charge someone if they saw fit.

Who is bound by community rules and sanctions?

As discussed in Part III, it is the Commission's view that the question who is bound (and who should be bound) by Aboriginal customary law is a matter for Aboriginal people themselves.²³⁵ In the context of community rules and sanctions established by community justice groups (some of which may reflect Aboriginal customary law) it is likely that membership of the community will

require adherence to these rules and that the community will be empowered to exclude members that refuse to comply with community rules. This may be acceptable for people who have chosen to live as part of the community and to abide by the community rules and sanctions set by the community justice group, but what of service providers (such as healthcare staff, teachers or law enforcement officers) who are required to reside at the community as part of their employment?

For matters that fall within Australian law (which includes under the Commission's proposal the regulation of alcohol within a community) those persons will of course be subject to that law.²³⁶ For matters that are not covered by Australian law, the Commission considers that it is an issue which should best be left for negotiation between service providers and the specific Aboriginal community. Some communities may choose to exempt service providers from certain community rules and sanctions, especially those that reflect aspects of Aboriginal customary law. Others may not, and it should be the right of a particular Aboriginal community to exclude a person who shows no respect for their customary law. The Commission acknowledges that there are some matters that, from an Aboriginal perspective, may be non-negotiable. For example, in Wuggubun it was stated that:

If we walk into a white person's paddock, we commit trespass. But when they walk on our sacred sites, they contravene nothing. Ours is the law of the land for us. They must obey our law, as we obey theirs.²³⁷

If communities wish for non-Aboriginal residents to abide by community rules and sanctions then it may be necessary that these rules and sanctions are explained. In some cases it may be appropriate that signs are displayed in the community.

234. Under traditional law the maintenance of law and order was restricted locally. Sanctions used by a 'clan, a tribe or a linguistic group' would rarely operate outside the group except where there were shared ceremonial and cultural practices or trading relationship: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 359.

235. See Part III 'Evidence and Parameters of Customary Law in Western Australia: Who is Bound (and Who Should be Bound) by Customary Law?', above, pp 53–54.

236. See discussion under 'Alcohol', above pp 125–27.

237. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 35.

An underlying principle of the Commission's proposal is that no person can be forced to submit to sanctions imposed by a community – to do so would amount to a breach of Australian law. If a service provider (whether Aboriginal or non-Aboriginal) resident in an Aboriginal community did not follow the community rules and sanctions that they know to apply to them, then the community would have the right to decide whether they wish that person to remain.

Roles within the criminal justice system

Any community justice group would have a number of important roles within the criminal justice system. This section discusses these roles generally; further discussion and proposals can be found below in sections on sentencing, bail, police and prisons, as well as in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure'.

Provision of information to courts

It is proposed that there should be a legislative provision which requires a court, when sentencing an Aboriginal person or when considering bail for an Aboriginal person, to take into account matters put before it by a community justice group in a similar form to s 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld).²³⁸ Such a provision should include, as it does in Queensland, that a court could consider information from a respected Elder of the community (which would be especially relevant where there was no community justice group in existence). A court could hear from a community justice group either on the application of the defence, prosecution, community justice group or on its own initiative. The advantage of this approach is that it provides a means by which a court can be informed of cultural matters, customary law and the community's views in relation to sentencing and bail in a manner which reduces the likelihood of false claims being made to the court (something which was brought to the attention of the Commission during the consultations). It also allows for the proper representation of the views of Aboriginal women because of the representative nature of the community justice group.

Diversion and supervision of offenders

The Commission is of the view that a court should be able to refer or divert an offender to a community justice group to be dealt with by them.²³⁹ In these circumstances the court could adjourn sentencing for the offender to attend the community justice group. Upon receiving a report or information from the community justice group, and if satisfied that the matter has been resolved, the court could impose a lesser (or in some cases no) additional penalty. This should assist to some degree in preventing the double punishment which many Aboriginal people face and invoke the process of community healing at an early stage. In appropriate cases this should result in diverting Aboriginal people away from imprisonment. Police should also be empowered to exercise their discretion to refer a matter to the community justice group without charging the person. The Commission has proposed that a pilot diversionary scheme involving community justice groups should be established.²⁴⁰

The Commission notes that a community justice group might also play a role in the supervision of people on community-based orders, parole or while subject to bail.²⁴¹ The role of community justice groups in the supervision of offenders is discussed in detail below.²⁴²

Aboriginal courts

In the case of an Aboriginal court, such as the Koori court model or circle sentencing (discussed in detail below),²⁴³ a community justice group might have a pivotal role in both establishing the court as well as selecting some of its members to sit with the magistrate or, if that was not appropriate, to advise on the most suitable person. This should assist in alleviating problems currently experienced by courts in relation to the choice of Elders to sit with a magistrate. During the consultations at Wiluna it was stated that sometimes the court breaks Aboriginal law because the Elder sitting with the magistrate is not appropriate in the circumstances. It was suggested that there should be two women and two men available to sit with the magistrate.²⁴⁴ The existence of a community justice

238. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', below pp 221–24.

239. See discussion under 'Sentencing Options', below pp 224–30.

240. See 'Police – Diversion', below p 239–42.

241. During the Commission's consultation in Warburton, community involvement in the administration of sentences was suggested, in particular, that magistrates should structure sentences so that offenders could be taken to the bush under the responsibility of Elders: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 4 & 6.

242. See 'Sentencing Options', below pp 224–30.

243. See 'Aboriginal Courts', below pp 142–57.

244. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

A community justice group should be accountable to the community that it serves.

group would provide a suitable panel from which to choose representatives to constitute the bench.

Other Matters

Accountability

A community justice group should be accountable to the community that it serves. One example of how this could be achieved is for the constitution or rules of a community justice group to provide for the nomination and the withdrawal of that nomination by each relevant family or skin group in the community. Therefore, if for any reason a member is no longer able to undertake his or her role the family could withdraw that nomination and nominate someone else in his or her place. The method by which a community justice group is to be held accountable should be determined by the community itself.

Remuneration

A difficult question arises in relation to the payment for services by Aboriginal members of community justice mechanisms.²⁴⁵ The Commission is of the view that where members of an Aboriginal community provide services (such as patrols), operate diversionary programs, supervise offenders and provide evidence or information to courts, those members should be appropriately reimbursed. This reflects the views expressed during consultations in relation to Elders not being paid²⁴⁶ and the recommendation of the RCIADIC that Aboriginal people who are involved in community and police-initiated schemes should receive adequate

remuneration in recognition of their contribution to the administration of justice.²⁴⁷ In this regard it has been said that:

There seems to be a presumption that Aboriginal people will take on voluntary and onerous community work and unpaid overtime to an extent that is not expected of non-Aboriginals.²⁴⁸

Civil liability of community justice group members

The view has been expressed that there should be legislative protection for members of a community justice group so that they are indemnified for their activities.²⁴⁹ In Queensland there is legislative protection from civil liability for members of a community justice group provided that their actions were honest and they were not negligent. If this provision prevents civil liability from attaching to a member of the community justice group then the liability instead attaches to the state.²⁵⁰ For illustrative purposes, Western Australian legislation that covers the indemnity of justices of the peace provides that civil liability does not attach for matters connected with the performance of the functions of a justice of the peace, unless done so 'corruptly or maliciously'.²⁵¹ In addition, unlike Queensland, the state is relieved of liability.²⁵² The question of the state's liability for the actions of community justice group's members is a matter for the state; however, the Commission considers that a provision which protects community justice group members while undertaking their roles within the criminal justice system is necessary.

245. See Aboriginal Community Justice Panel Review Team, *Review of the Aboriginal Community Justice Panel: Final Report* (2001) 25 which stated that the review committee supported the continued voluntary status of the panel workers; and note the Victorian Aboriginal Legal Service Discussion Paper in relation to the Aboriginal Community Justice Panel Review which criticised the review's findings that panel workers should remain voluntary: see <<http://www.vals.org.au/faqs/cjp/>> 4–6.

246. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24; *Wuggubun* 9–10 September 2003, 33 where concerns were raised that Elders were not paid when they were involved in the criminal justice system. The Commission notes that the remuneration of Aboriginal people involved in these types of activities is supported by the New South Wales Aboriginal Justice Plan: see New South Wales Aboriginal Justice Advisory Council, *New South Wales Aboriginal Justice Plan: Beyond Justice* (2004–2014) 19.

247. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [29.3.21] Recommendation 221.

248. Sex Discrimination Commissioner of the Human Rights and Equal Opportunity Commission, 'Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory' (May 2003) 'Principle Four': see <http://www.hreoc.gov.au/sex_discrimination/customary_law/submission.html>

249. Fitzgerald T, *Cape York Justice Study* (Department of the Premier and Cabinet Queensland, 2001) 120.

250. *Aboriginal Communities (Justice and Land Matters) Act 1984* (Qld) s 92.

251. *Justices of the Peace Act 2004* (WA) s 19.

252. *Ibid.*

Proposal 18

That legislation, the 'Aboriginal Communities and Community Justice Groups Act' be enacted to provide for the establishment of Aboriginal community justice groups upon the application, approved by the Minister for Indigenous Affairs, of an Aboriginal community.

That the Minister must approve a community justice group if satisfied that the membership of the community justice group is representative of all relevant family, social or skin groups in the community (to be defined in the Act); that there is provision for the equal representation of men and women; and that a majority of the members of the community support the establishment of a community justice group.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' distinguish between the two types of Aboriginal communities which are covered by the legislation:

- Discrete Aboriginal communities which have been declared by the Minister for Indigenous Affairs to be a community to which the legislation applies.
- All other Aboriginal (non-discrete) communities.

That the Minister for Indigenous Affairs is to declare that an Aboriginal community is a discrete Aboriginal community to which the Act applies, if satisfied, that there are structures or provisions which require that the proposed community justice group consult with the members of the community in relation to the nature of the community rules and community sanctions.

That those communities that are currently declared to be a community to which the *Aboriginal Communities Act 1979* (WA) applies be deemed to be an Aboriginal community to which the proposed 'Aboriginal Communities and Community Justice Groups Act' applies.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' include a definition

of what constitutes community lands. For communities with a crown reserve lease or pastoral lease the definition should state that the community lands are the entire area covered by the reserve or pastoral lease. For other communities the Minister is to declare the boundaries of the community lands in consultation with the community.

That the proposed 'Aboriginal Communities and Community Justice Groups Act' provide that the functions of a community justice group in a discrete Aboriginal community include setting community rules and community sanctions subject to the laws of Australia. For all community justice groups the functions would include the establishment of local justice strategies and crime prevention programs; the provision of diversionary options for offenders; the supervision of offenders subject to community-based orders, bail or parole; and the provision of information to courts.

That the legislation include an indemnity provision for members of a community justice group to the effect that such members are relieved of civil liability for any act or omission in the performance of their functions within the criminal justice system.

That an Aboriginal Justice Advisory Council be established to oversee the consultation process with Aboriginal communities and to provide advice and support to communities who wish to establish a community justice group. The membership of the Aboriginal Justice Advisory Council should be predominantly Aboriginal people from both regional and metropolitan areas as well as representatives from relevant government departments including the Department of Indigenous Affairs, the Department of Justice and the Department for Community Development. This council is to be established within a framework that provides that its role is to advise and support Aboriginal communities and that government representatives are involved to provide support based upon their particular expertise.

The potential benefits of the Commission's proposal for community justice groups are that it will:

- assist Aboriginal people to develop their own processes for dealing with justice issues within their community;
- recognise aspects of Aboriginal customary law in a practical way with as little interference as possible by the Australian legal system;
- enhance the cultural authority of Elders;
- reduce offending;
- improve the potential for Aboriginal people to be diverted away from the criminal justice system;
- reduce the rate of Aboriginal imprisonment and detention;
- provide more effective sentencing and bail options for courts;
- enable Aboriginal people to be actively involved in the criminal justice system;
- assist in improving the level of understanding of the criminal justice system in Aboriginal communities; and
- assist in improving the broader governing capacity of Aboriginal communities.

Community Justice Groups in Action

In order to illustrate how a community justice group could operate in practice, two hypothetical case studies are set out below. These examples are not intended to be prescriptive, but rather seek to demonstrate the potential for community justice groups to deal with justice issues in their own communities.

Case Study 1

A young Aboriginal male resides in a community where the community rules prohibit the use of alcohol. This man has been repeatedly caught drinking alcohol at the community as well as at a nearby town. The community justice group has previously warned the man to stop drinking, including during a community meeting. The man is again caught drinking alcohol but this time he has assaulted his partner by pushing her hard enough that she fell to the ground. He does not have any history of violence.

The community justice group holds a meeting with the offender and the victim. All agree that because this is the offender's first episode of violent behaviour it would not be appropriate to refer him to the police. During the meeting it was agreed by all parties that the offender must spend three months at the community's outstation and abstain from drinking alcohol. During the time at the outstation he would be supported by Elders who considered that he should engage in traditional activities that would enhance his respect for his culture, community and family.

If all goes well then the offender is diverted from the criminal justice system but at the same time the underlying causes of his offending behaviour are being addressed. On the other hand, if the offender does not abide by the agreement the community justice group could consider other options such as referring the matter to the police or asking the offender to leave the community.

Case Study 2

An Aboriginal boy from a discrete community is caught by the police in a nearby town for burglary. He and four other juveniles broke into the local liquor store and stole alcohol and cigarettes. The boy had left his community to meet up with his friends in town. He had been drinking alcohol prior to committing the burglary. This boy does have a criminal record, but this is his first serious offence.

The police arrest the boy in the town at night and because they cannot find a responsible adult he spends the night in custody. The next day he appears before the local magistrate. The magistrate requests to hear from a member of the community justice group who is due to give evidence in court that day for another matter. This person explains that he is surprised about the boy's behaviour and suggests that he has been spending too much time with his friends in the town. At the community no alcohol is allowed. The member of the community justice group also explains to the court that the boy would be a suitable candidate for a bush trip program that is being run by Elders in the community.

The magistrate adjourns sentencing for three months and places the boy on bail to a responsible adult. The member of the community justice group agrees to take on this supervisory role.

After three months the boy and member of the community justice group reappear in court and inform the magistrate that the boy completed the program and appears to be settled. The magistrate then decides to dismiss the charge under s 67 of the *Young Offenders Act 1994* (WA). Alternatively, if the boy had not attended the program the magistrate would be able to sentence the boy in the usual manner.

Aboriginal Courts

This section of the Discussion Paper considers the development of Aboriginal courts throughout Australia. The Commission uses the term 'Aboriginal courts' to refer to all of the current models in Australia where Aboriginal Elders are involved in court proceedings. These models include the Nunga Court, Koori Court, Murri Court and circle sentencing. Aboriginal courts, as they currently exist, operate within the boundaries of the Australian legal system and in no case does an Aboriginal Elder have authority in the Australian legal system to decide a case or impose punishment. The role of Elders is primarily to advise the court. In some courts Elders also speak to the accused (about the consequences of their behaviour) in a culturally appropriate manner. It is important to note that Aboriginal courts are not Indigenous-controlled 'community courts' vested with western judicial power. Such courts do not presently exist in Australia, although there are examples in other countries.¹ It is apparent that court-like structures or processes are not part of Aboriginal customary law. As stated by Berndt and Berndt:

Formal gatherings in the nature of law courts with judicial functions do not exist in Aboriginal Australia; there is no formally constituted court of law, comprising special persons vested with authority and power to deal with cases, pass judgment, and impose punishment.²

As a consequence the Commission does not support the establishment of Aboriginal-controlled community courts.³ It is the view of the Commission that its proposal for community justice groups is the most appropriate

method of recognising Aboriginal customary law in the criminal justice process;⁴ however, the Commission does support the establishment of Aboriginal courts in order to make the Western Australian criminal justice system more effective. Aboriginal courts provide an environment which is more sensitive to Aboriginal customary law and other cultural matters and can, therefore, more easily and effectively take those matters into account. Importantly, by recognising the central role of Aboriginal Elders, these courts may also benefit Aboriginal communities by reinvigorating Aboriginal customary law and cultural values where those structures may have broken down.

The single most important feature of the various models currently operating is the involvement of Aboriginal Elders and other respected persons in the court process. The need for Aboriginal participation in sentencing has been recognised for some time. In *Munugurr v The Queen*⁵ the Northern Territory Court of Criminal Appeal recommended that judges should sit in Aboriginal communities for a number of reasons, including that it would make Aboriginal witnesses more comfortable and show the community that justice was being done.⁶ In recent years, courts across Australia have adopted various procedures and practices aimed at increasing the involvement of Aboriginal people, especially Elders, in sentencing matters. Aboriginal courts have emerged in recent times in order to: reduce the alarming over-representation of Aboriginal people in the criminal justice system; respond to the recommendations of the RCIADIC which advocated for greater participation by Aboriginal people in the

1. Tribal courts in Indian reservations in the United States of America are empowered to deal with all but the most serious offences committed on the reservations by an Indian person and these courts are able to impose imprisonment up to one year: see HREOC Aboriginal and Torres Strait Social Justice Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 35, 39. See <http://www.hreoc.gov.au/social_justice/customary_law/nt_lawreform.htm>. Village courts, such as those that exist in Papua New Guinea, were considered in some detail by the Australian Law Reform Commission (ALRC) and it is noted that, although these courts were supported to some extent by the ALRC, there was greater support for the unofficial dispute resolution methods which also operated at the village level: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [769]–[802].
2. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 348.
3. In this regard the Commission notes that criticisms of the regime for Village courts in Papua New Guinea indicate that these courts have become more westernised over time and it has been noted that generally Indigenous-controlled courts—although commencing with flexible procedures—tend to incorporate western and formal procedures over time and thereby may eventually undermine customary law: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 231, 237.
4. It is the Commission's view, as stated throughout this Paper, that Aboriginal customary law should be applied by Aboriginal people within their own communities and according to their own rules.
5. *Munugurr v The Queen* (1994) 4 NTLR 63.
6. Lofgren N, 'Aboriginal Community Participation in Sentencing' (1997) 21 *Criminal Law Journal* 127.

administration of criminal justice; and as a consequence of strategies which are based upon partnerships and agreements between state governments and Aboriginal people.⁷ They have also resulted from recognition that the adversarial system and procedures under Australian law are not always appropriate for Aboriginal people.⁸ While many of the initiatives have resulted from the individual efforts of particular magistrates and Aboriginal community members, there is a growing trend of greater formal recognition of these courts.⁹

During the Commission's consultations there was extensive support for Elders to become more involved in criminal justice issues both prior to and during formal involvement with the criminal justice system.¹⁰ Many communities expressed support for one or more Aboriginal people to sit with a magistrate in court¹¹ and for the various Aboriginal court models which are currently operating.¹² On the other hand there was limited support by some communities for Aboriginal courts where authority would be vested solely in the Elders to administer justice in relation to Aboriginal customary law matters and disputes.¹³

Previous Inquiries

Australian Law Reform Commission

In its 1986 report on *The Recognition of Aboriginal Customary Laws*, the ALRC did not support a general Australia-wide scheme for Aboriginal courts. However, it did consider that such courts or bodies could be established if genuinely desired by the local community.¹⁴ In this respect the ALRC was referring to Aboriginal-controlled community courts as distinct from the various models of Aboriginal courts which currently operate under the Australian legal system. If such

community courts were to be established the ALRC prescribed minimum standards¹⁵ which included that:

- the local community should have power to make by-laws which include Aboriginal customs, rules and traditions;
- individual rights, such as a right of appeal and the right to be dealt with under the general system, should be protected;
- by-laws should in general apply to all persons within the boundaries of the community;
- the court should determine its own procedure subject to the general requirement to be procedurally fair;
- the community should have some say as to who constitutes the court;
- the courts' powers should include powers of mediation and conciliation;
- such courts should have appropriate support facilities; and
- there should be regular reviews of the operation of these courts.

Report on Alternative Dispute Resolution in Aboriginal Communities to the Northern Territory Law Reform Committee

In 1997 the NTLRC formed a sub-committee to report on alternative dispute resolution in Aboriginal communities. It recommended that community justice plans could incorporate a community court but that, if they did so, the court would be required to adhere to certain rights of the defendant (such as the right to an interpreter, the right to legal assistance, the right

7. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 1–2.

8. Freiberg A, *Innovations in the Court System* (Paper presented at the Australian Institute of Criminology Conference, *Crime in Australia: International Connections*, Melbourne, November 2004) 8.

9. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 35.

10. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 15, 17; *Armada*, 2 December 2002, 25; *Midland*, 16 December 2002, 40. The Commission also notes that research conducted for the Department of Justice in the Kimberly found that between 75–85 per cent of Aboriginal people questioned, in both remote communities and towns, supported the greater use of Aboriginal ways of dealing with problems within the court system. See Colmar Brunton (WA) and Colmar Brunton Social Research, *Kimberley Regional Justice Project: Market Research* (Perth: Department of Justice, 2002) 8.

11. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002 8; *Armada*, 2 December 2002, 25; *Rockingham*, 9 December 2002, 30; *Midland*, 16 December 2002 36; *Broome*, 17–19 August 2003, 25; *Wuggubun*, 9–10 September 2003, 39.

12. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggabun*, 9–10 September 2003, 38 where it was indicated that they were interested in circle sentencing; *Laverton*, 6 March 2003, 14 where they supported the Koori court; *Geraldton*, 26–27 May 2003, 16; *Pilbara*, 6–11 April 2003, 15 which referred to initiatives at Yandeyarra, Wiluna and the Koori court; *Bunbury*, 28–29 October 2003, 12 which also supported the Koori court model; *Pilbara*, 6–11 April 2003, 15 and *Broome*, 17–19 August 2003, 30 which both supported Yandeyarra circle sentencing court; *Manguri*, 4 November 2002, 5 which supported sentencing circles; *Mirrabooka*, 18 November 2002, 8 which supported Elders sitting with Magistrates.

13. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27; *Pilbara*, 6–11 April 2003, 15; *Albany*, 18 November 2003, 15.

14. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [817].

15. *Ibid* [818].

of silence and the right to be heard) and also provide a right of appeal to a general court of summary jurisdiction.¹⁶ It was proposed that a community court should have the power to impose a range of sanctions, some based on customary law and others on sanctions under the Australian legal system; however, community courts should not be able to impose imprisonment.¹⁷

Although this proposed scheme aims to recognise Aboriginal customary law (within defined limits) and allow communities to develop their own strategies to justice issues,¹⁸ the Commission is of the view that an attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulties. In this matter, the Commission agrees with the ALRC that it is preferable to establish structures which do not involve the exercise of western judicial power.¹⁹ The Commission's proposal for community justice groups aims to recognise an Aboriginal community's right to apply and enforce its own customary law (subject to compliance with Australian law) while at the same time it does not seek to impose a series of additional restrictions as to how that customary law must be applied.

Historical Perspective

In its report on Aboriginal customary law the ALRC considered examples of special courts which had been established for Aboriginal people throughout Australia. It was noted that the motivation was not always to accommodate the needs of Aboriginal people or to recognise Aboriginal customary law issues or cultural matters.²⁰ For example, the Courts of Native Affairs in Western Australia operated between 1936 and 1954 to deal with serious offences committed by 'natives'

against other 'natives'. The legislation which covered the operation of these courts permitted a 'head man' to assist the court; however, it was not clear whether the role of the 'head man' was to act as an interpreter or as a witness.²¹ While the legislation ostensibly allowed 'tribal custom' to be taken into account in mitigation, it has been suggested that these courts were not only ineffective in this regard but also removed many important legal rights which operated under the general legal system.²²

Both Western Australia and Queensland established Aboriginal community courts, although, as has been discussed already in relation to the by-law scheme, these courts in Western Australia never came to fruition. The Queensland community courts, which were established in the 1960s, included dealing with breaches of the community by-laws and resolving disputes that were not subject to any Australian law. These courts were convened by justices of the peace who were resident in the local community. Legislation²³ provided that these courts were to exercise their jurisdiction having regard to the usage and customs of the community; in theory, therefore, these courts were able to take into account and deal with customary law matters.²⁴ However, in practice there were a number of problems which led to the eventual abolishment of these courts and the repeal of the legislation.²⁵ Such problems included the lack of training for justices of the peace, the lack of administrative support, the requirement that the procedure to be followed was the same as for a general magistrates court, and the lack of sentencing options.²⁶ Perhaps the most compelling reason for the failure of these courts was that, despite the apparent ability to consider Aboriginal customary law matters, the practices and procedures of these courts were such that they essentially

16. NTLRC, *Report on Alternative Dispute Resolution in Aboriginal Communities*, Report 17C (1997) 20–22. In this regard the Commission notes the observation that it may be inappropriate to impose procedural standards to Aboriginal communities because Aboriginal dispute resolution methods involve the entire community and focus on restoration: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 236.

17. NTLRC, *Report on Alternative Dispute Resolution in Aboriginal Communities*, Report 17C (1997) 22–23.

18. Ibid 2.

19. The ALRC observed in relation to the tribal courts in America that it has been argued that 'Indian justice as dispensed by Indian courts' essentially mirrors white justice and white institutions: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [788].

20. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [721]–[722].

21. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16 *Current Issues in Criminal Justice* 26, 27.

22. Auty K, 'Putting Aboriginal Defendants Off Their Country' in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The cultural politics of juries in Australia* (Perth: University of Western Australia, 2004) 75–77. The Commission notes that the right to an appeal and the right to a trial by jury were removed in these 'courts'. The boundaries between the roles of police and protectors were often blurred with both at times acting as counsel for the defendant. Also at the same time that these 'courts' operated the Commissioner of Native Affairs was able to recommend to the relevant minister that notices be displayed in any district advising Aboriginal people that a particular 'tribal practice' was to be discontinued. Protectors were required to take action against any 'natives' who persistently disregarded these notices: 140–41.

23. *Community Services (Aborigines) Act 1984* (Qld).

24. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Working Paper No 54 (May 1999) 215–16.

25. The Queensland Government repealed the legislative provisions which allowed a community to establish a community court in 2005 because there were no longer any such courts in existence: see Queensland Government, *Summary of New Laws for Aboriginal Community Governance: Local Government (Community Government Areas) Bill 2004* <http://www.datsip.qld.gov.au/pdf/mcmc/draft_bill_summary.pdf> 12.

26. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Working Paper No 54 (May 1999) 218–19.

The Commission is of the view that an attempt to create an Aboriginal-controlled court which is partly based on Aboriginal customary law and partly based on general legal principles is fraught with difficulties.

administered Australian law.²⁷ For example, where an alleged offender pleaded not guilty to an offence, the court was required to follow the procedures applicable to mainstream courts including the requirement to follow strict rules of evidence.²⁸ A review of the community courts recommended that justices of the peace (of Indigenous descent wherever possible) should sit in a general magistrates court with all the accompanying support and training from justice agencies.²⁹ This scheme was eventually replaced with a scheme which operated within the Australian law but which aimed to include Aboriginal personnel in the administration of justice.

Similar observations can be made in relation to the attempt in Western Australia to introduce community courts under the by-laws scheme.³⁰ Unlike Queensland there was no legislative basis for their operation and it was the intention of the parties involved that Aboriginal justices of the peace would sit in a general magistrates court and that these courts would be staffed with Aboriginal personnel.³¹ It was not therefore a separate court with separate jurisdiction. In practice, where Aboriginal justices of the peace had been appointed, it appeared that they only dealt with breaches of the by-laws, even though they had the same jurisdiction to hear matters as other justices of the peace.³² The review of the by-law scheme in 1992 indicated that many Aboriginal justices of the peace found it difficult to deal with some matters that involved their family or kin. Also the literacy requirements for appointment potentially excluded Aboriginal Elders who were often considered by the community to be the most appropriate candidates.³³

The ALRC noted that in some jurisdictions individual magistrates developed their own practices in relation to hearing from Aboriginal Elders and making their courts less formal; these practices were described as ad hoc and dependent upon the individual judicial officer involved.³⁴ This is a situation which has continued to the present day. Current practices in Western Australia have been developed by local magistrates and there is no legislation or formal government policy which ensures the permanency of these initiatives.

The Relationship Between Aboriginal Courts, Problem-Solving Courts and Therapeutic Jurisprudence

While many jurisdictions in Australia are witnessing the development of Aboriginal courts; at the same time other specialist courts and problem-solving courts are emerging. Specialist courts have been defined as courts which have limited jurisdiction or alternatively exclusive jurisdiction in relation to a particular area.³⁵ Examples of specialist courts are children's courts, sexual offences courts and liquor licensing courts. Problem-solving courts (which are sometimes referred to as problem-orientated courts) use the court's authority and processes to address underlying problems.³⁶ Examples are drug courts and family violence courts (both of which currently exist in Western Australia). In addition, the practice of therapeutic jurisprudence has evolved in Australia and claims to 'explore the healing power of the law' and 'promote the wellbeing of participants'.³⁷ Therapeutic jurisprudence encourages greater participation in the

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27. Miller B, *Crime Prevention and Socio-Legal Reform on Aboriginal Communities in Queensland* (Paper presented at Police and the Community in the 1990s, Australian Institute of Criminology Conference, Brisbane, 23–25 October 1990) 141.
28. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Working Paper No 54 (May 1999) 219.
29. Queensland Law Reform Commission, *The Role of Justices of the Peace in Queensland*, Report No 54 (December 1999) 23, 28.
30. See 'The Western Australian Aboriginal Community By-Law Scheme', above pp 115–16.
31. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [750].
32. McCallum A, *Review of the Aboriginal Communities Act 1979 (WA)* (Perth: Aboriginal Affairs Planning Authority, July 1992) 11.
33. *Ibid* 13–14.
34. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [722].
35. Freiberg A, *Innovations in the Court System* (Paper presented at Crime in Australia: International Connections, Australian Institute of Criminology Conference, Melbourne, November 2004) 2.
36. *Ibid* 8.
37. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 1.

court process and aims to 'promote respect between the judicial officer and participants'.³⁸ It has been said that, although therapeutic jurisprudence 'acknowledges the coercive side of the court and the law, it also says that the authority and standing of the court and those who preside in it can be a powerful mechanism to inspire rather than to coerce change'.³⁹ The practice of therapeutic jurisprudence has won favour in Western Australia which is demonstrated by a resolution of all country magistrates to apply its principles in their courts.⁴⁰

Some commentators have expressed the view that Aboriginal courts utilise therapeutic jurisprudence. Freiberg, for example, concludes that Aboriginal courts, although not problem-solving courts, are specialist courts with 'some problem-solving and therapeutic overtones'.⁴¹ It has been claimed that due to the objective of the Victorian Koori Court to have a 'positive impact upon the lives of those people who appear before the court' it can be classified as a 'therapeutic jurisprudence initiative'.⁴² Others have disagreed, claiming that Aboriginal courts are 'in a category of their own' because of the role of Elders.⁴³ While it is clear that Aboriginal courts are specialist courts, there are differing views as to whether Aboriginal courts should be classified as problem-solving courts and whether they operate within the framework of therapeutic jurisprudence. The Commission has strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts. If there is a problem to be solved it is the failure of the criminal justice system to accommodate the needs of Aboriginal people and to ensure that they are fairly treated within that system.

At this stage it is important to note that the Commission is concurrently working on another reference which specifically examines problem-

orientated courts and judicial case management in Western Australia. That reference will consider the effectiveness of practices such as therapeutic jurisprudence in relation to Aboriginal people. The Commission also wishes to make clear that its support for the establishment of Aboriginal courts in Western Australia should not be taken to imply that there is no need for courts generally to adapt their procedures so that they are more culturally appropriate and sensitive to the needs of Aboriginal people.⁴⁴ However, the focus of the discussion in this section is the relationship between Aboriginal courts and Aboriginal customary law, the role of Aboriginal Elders and the ability of Aboriginal courts to provide a more effective criminal justice system for Aboriginal people in Western Australia.

Examples of Aboriginal Courts Throughout Australia

Western Australia

Yandeyarra Circle Sentencing Court

The Yandeyarra Circle Court commenced in May 2003 after extensive consultations between the local magistrate and the community.⁴⁵ The magistrate, the parties to the proceedings, family members and Elders from the community sit around a table.⁴⁶ The proceedings involve the prosecutor and the defence counsel presenting their case and then the offender has an opportunity to speak. The magistrate and the Elders have a private discussion about the sentencing options and then the Elders and the magistrate inform the offender of the sentence.⁴⁷ On occasions, defendants in the South Hedland Magistrates Court have been released on bail, with the consent of the Yandeyarra community, on condition that they reside at the community until they appear in the Yandeyarra

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- 38. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [19].
 - 39. King M & Wilson S, 'Country Magistrates' Resolution on Therapeutic Jurisprudence' (2005) 32(2) *Brief* 23, 24.
 - 40. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 2.
 - 41. Freiberg A, *Innovations in the Court System* (Paper presented at Crime in Australia: International Connections Conference, Australian Institute of Criminology, Melbourne, November 2004) 8; King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at the Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 2.
 - 42. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 19.
 - 43. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 4.
 - 44. See discussion under 'Practice and Procedure', below pp 231–34 and Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.
 - 45. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [24].
 - 46. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 127. It was observed, as part of the LRCWA research for Project No 96, that all parties wore casual clothes.
 - 47. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 4.

The Commission has strong reservations about the categorisation of Aboriginal courts as problem-orientated or problem-solving courts.

Circle Court.⁴⁸ During this period the Department of Justice community corrections officer and members of the community at Yandeyarra work behind the scenes to consider options available for the accused.⁴⁹ Like many Aboriginal courts, this scheme was initiated by a particular magistrate who had a strong connection with the local Aboriginal community. When that magistrate was transferred it was not clear whether the court would continue to operate as frequently.⁵⁰ It appears that the court has continued to sit every four to five weeks over the last couple of years. The magistrate who convened the court from September 2003 until June 2004 has stated that for the 50–60 matters that have been dealt with there have been no breaches of community-based orders.⁵¹ This initial success has been accredited to the strong community support for the court and the existence of good local support facilities such as the women's centre, Aboriginal out-camp and juvenile bail hostel.⁵²

Wiluna Aboriginal Court

In 2001 the Carnarvon magistrate, after meeting with members of the Aboriginal community and other stakeholders, introduced new procedures and sentencing options in order that the court process could be more 'sensitive' to Aboriginal culture.⁵³ The layout of the court has been said to reflect 'the way in which a traditional meeting would occur in the bush'.⁵⁴ Tables are placed at the same level in a triangular design and an Aboriginal Elder sits with the magistrate at the base of the triangle. No-one stands during the proceedings. The magistrate retains full sentencing

authority in order to prevent any interference with the traditional role of the Elders. The role of the Aboriginal Elder who sits with the magistrate, as well as other Elders who are present in the courtroom, is to speak to the accused in the local language. The Elders speak to the defendant about how their behaviour has impacted upon Aboriginal traditions and culture.⁵⁵ From the magistrate's perspective, this has a significant impact on the accused.⁵⁶ The principle of mutual respect underpins the operation of the court; for example, if an Aboriginal person is required to attend a funeral the magistrate has allowed them to do so provided they came back to court as soon as possible.⁵⁷

Magistrates sitting with Elders and the proposed community courts

Since the 1970s magistrates in the Kimberley have, at various times, informally adopted the practice of inviting Elders to sit with them when dealing with Aboriginal people.⁵⁸ For example, in 2001 a Western Australian magistrate regularly invited two to three Aboriginal Elders (both men and women) to sit with him during circuit courts in Aboriginal communities.⁵⁹

The Department of Justice has plans for long-term community courts in a number of remote locations. It is not envisaged that these plans will be working until the 'multi function justice facilities' recommended by the Gordon Inquiry are constructed in each location. In the meantime, if there is no change to the government policy, magistrates will continue to employ their own procedures.⁶⁰ The Commission understands

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48. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [45]. In one case, observed as part of the LRCWA research for Project No 96, an accused who was charged with disorderly conduct was placed on a court order that included as a condition that he was not to leave the Yandeyarra community without the permission of an Elder.
49. Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 28.
50. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 127.
51. Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 29.
52. Ibid 29–30.
53. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [23].
54. King M & Wilson S, 'Magistrates as Innovators' (2002) 29(11) *Brief* 9.
55. Interview with Magistrate Wilson, 2 August 2005, LRCWA, Project 96.
56. King M & Wilson S, 'Magistrates as Innovators' (2002) 29(11) *Brief* 9.
57. Interview with Magistrate Wilson, 2 August 2005, LRCWA, Project 96.
58. King M & Wilson S, 'Magistrates as Innovators' (2002) 29(11) *Brief* 7.
59. 'The Law Report Bush Courts', *Radio National* (Pt 2, 21 August 2001): see <<http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s349743.htm>> 7.
60. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 127–28.

that the Department of Justice is generally considering the issues in relation to Aboriginal courts after completing a discussion paper on the topic.⁶¹

Geraldton Alternative Sentencing Regime

The Geraldton Alternative Sentencing Regime (GASR) commenced in 2001 and has been described as a specialist problem-solving court program which aims to 'promote the rehabilitation of offenders with substance abuse, domestic violence and other offending related behaviours'.⁶² Although it is clearly not an Aboriginal court, the Commission considers that it merits discussion as it is the only specialist court in Western Australia that has dealt with a significant proportion of Aboriginal people.⁶³ An evaluation of the regime found that 40 per cent of participants (as at May 2004) were Aboriginal.⁶⁴ Morgan and Motteram conclude that this is a result of the participation of Aboriginal services such as the ALS and 'demographic factors'.⁶⁵ The improved Aboriginal participation rate has also been attributed to the fact that the admissions policy for GASR is much broader than for other specialist courts in Western Australia: it includes problems which are of particular concern to Aboriginal people such as alcohol and solvent abuse.⁶⁶

GASR takes a holistic approach when considering strategies for rehabilitation and it has also incorporated the stress reduction and self-development technique of transcendental meditation.⁶⁷ Magistrate King concludes that this practice has been beneficial for many Aboriginal offenders for two reasons: most Aboriginal offenders come from a background of 'intergenerational stress due to historical, political, social and economic factors'; and the practice of meditation is, according to Magistrate King, consistent with

Aboriginal culture.⁶⁸ Comments from the Geraldton office of the ALS supported the benefits of transcendental meditation for some of their clients.⁶⁹ Magistrate King has stated that GASR uses principles based on Aboriginal dispute resolution: the promotion of healing and the involvement of the offender by giving them a voice.⁷⁰ Commentators have observed that GASR has been an empowering experience for Aboriginal participants.⁷¹ An evaluation of GASR mentioned that the magistrate had considered the need of one particular offender to attend a drug treatment program with the support and guidance of an Aboriginal Elder.⁷² Despite this and the support for the program from the ALS, the evaluation highlighted that the regime did not have strong cultural support.⁷³ While the Commission supports this initiative (along with any other specialist court project which aims to be more culturally appropriate and effective for Aboriginal people), it notes that the GASR does not include the most important feature of Aboriginal courts – the direct participation of Aboriginal Elders and other community members.

South Australia

The Nunga Court, the first of its kind in Australia, was developed in 1999 by Magistrate Vass and commenced in Port Augusta. Nunga Courts have since been established in Port Adelaide and Murray Bridge. The program now extends to children, with a pilot Aboriginal Youth Court at Port Augusta.⁷⁴ The court, which deals with Aboriginal people who have pleaded guilty, aims to provide a more culturally appropriate setting, reduce the over-representation of Aboriginal people in custody and reduce reoffending by promoting improved compliance with court orders. In particular, the Nunga Court has been effective in increasing court

61. Discussions with Mr John Klarich, Director, Magistrates Courts and Tribunals, Department of Justice, 17 August 2005.

62. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, August 2004) 1.

63. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 126.

64. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, 2004) 10.

65. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 126.

66. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime*, (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 3.

67. King M, 'Applying Therapeutic Jurisprudence in Regional Areas – The Western Australian Experience' (2003) 10(2) *E Law: Murdoch University Electronic Journal of Law* [37]–[40]

68. King M & Ford S, *Exploring the Concept of Wellbeing in Therapeutic Jurisprudence: The example of the Geraldton Alternative Sentencing Regime* (Paper presented at The Cutting Edge: Therapeutic Jurisprudence in Magistrates Courts Conference, Perth, 6 May 2005) 4 and note that due to a lack of government funding transcendental mediation is no longer available as part of the program.

69. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, 2004) 13.

70. Submissions received from Magistrate King, 13 July 2005, in relation to Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005).

71. Cant R, Downie R & Henry D, *Report on the Evaluation of the Geraldton Alternative Sentencing Regime* (Perth: Department of Justice, 2004) 28.

72. *Ibid.*

73. *Ibid.*

74. Tomaino J, *Aboriginal (Nunga) Courts*, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 2, 14. The name of the court was chosen by the local Aboriginal community.

attendance rates, which are notoriously low for Aboriginal people throughout Australia.⁷⁵ Aboriginal justice officers are employed to assist the court, the offender and the community. The magistrate sits next to the Aboriginal justice officer or an Aboriginal Elder who provides advice to the magistrate about cultural or community issues.⁷⁶ While the court is held in a court building, the magistrate sits at the same level as the offender and other participants.⁷⁷ It has been said that the Nunga Court 'creates a far less intimidating environment for Indigenous offenders by removing the structure of hierarchy and adversarial hostility evident in the Magistrates Court'.⁷⁸ The court is said to be effective because of the 'free and open exchange' between the magistrate and the offender and, where Elders are involved, because of kinship and family relationships. These relationships have led to more effective undertakings and promises by the offender.⁷⁹ However, from the perspective of recognising Aboriginal customary law and promoting greater community involvement in sentencing, there is no legislative requirement to consider the views or information received from the Aboriginal Elder.⁸⁰

The role of the Aboriginal justice officer has also contributed to more effective delivery of services. These officers assist offenders in understanding court orders, assessing the capacity to pay fines, advising magistrates of alternative options, and generally providing support to families, victims and offenders.⁸¹

Queensland

The Murri Court commenced in Brisbane in August 2002 and has since been extended to Rockhampton and Mount Isa. There is also a Youth Murri Court in Brisbane

which was the first youth Aboriginal court in Australia.⁸² The court is modelled principally on the South Australian Nunga Court and the Victorian Koori Court; the magistrate sits at the same level as the offender and sits next to an Elder who advises the magistrate throughout the proceedings. The Brisbane Murri Court convenes around a custom-made oval table, whereas the magistrate in the Rockhampton court still sits at the bench.⁸³ The police prosecutors do not wear uniforms.⁸⁴ The purpose of the court is to reduce the over-representation of Aboriginal and Torres Strait Islander people in custody by providing, through the involvement of Elders and community justice groups, more culturally appropriate bail and sentencing orders.⁸⁵ Queensland is the only state that has a legislative requirement that sentencing courts consider the submissions from a community justice group or Elder.⁸⁶

The Murri Court has also contributed to the re-connection of participants with their communities.⁸⁷ The Elder who sits with the magistrate addresses the offenders directly in relation to their offending behaviour and its effect on the community. The sentencing decision is made by the magistrate in order to protect Elders from any family or cultural pressure.⁸⁸ However, a magistrate from the Rockhampton court states that there 'is a discernible atmosphere of seriousness when the Elders are present' and further that:

What cannot be easily explained is the power of the Murri Court process on a spiritual or emotional level. The power of the natural authority and wisdom of the Elders is striking in the Courtroom. There is a distinct feeling of condemnation of the offending but support for the offender's potential emanating from the Elders and the Justice Group members.⁸⁹

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75. Ibid 4, where it is stated that the attendance rate in the Nunga court is 80 per cent compared to less than 50 per cent for the general magistrate's court.
76. Welch C, 'South Australian Courts Administration Authority – Aboriginal Court Day and Aboriginal Justice Officers' (2002) 5(14) *Indigenous Law Bulletin* 5.
77. Tomaino J, *Aboriginal (Nunga) Courts*, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 4.
78. Han A, *The Nunga Court: Creating Pathways for the Improved Sentencing Practices of Indigenous Offenders*, Report prepared for Sandra Kanck MLC (November 2003) 9: see <<http://www.sa.democrats.org.au/Campaigns/LawJustice/Nunga%20Court.html>>.
79. Tomaino J, *Aboriginal (Nunga) Courts*, Information Bulletin (Adelaide: Office of Crime Statistics and Research, undated) 5 & 12.
80. Han A, *The Nunga Court: Creating Pathways for the Improved Sentencing Practices of Indigenous Offenders* (November 2003) 20: see <<http://www.sa.democrats.org.au/Campaigns/LawJustice/Nunga%20Court.html>>.
81. Welch C, 'South Australian Courts Administration Authority – Aboriginal Court Day and Aboriginal Justice Officers' (2002) 5(14) *Indigenous Law Bulletin* 5.
82. Judge Irwin MP, *Queensland Magistracy – Present and Future*, Bar Practice Course (July 2004) 8.
83. This was as a result of consultations with the Indigenous community which indicated that it was their preference that the proceedings were still viewed by offenders as a court process: see Hennessy A, 'Indigenous Justice – Indigenous Laws at the Colonial Interface' (Paper presented at the LAWASIA Down Under 2005 conference, Gold Coast, March 2005) 4.
84. Ibid.
85. Hennessy A, 'Indigenous Justice – Indigenous Laws at the Colonial Interface' (Paper presented at the LAWASIA Down Under conference, Gold Coast, March 2005) 2.
86. *Penalties and Sentences Act 1992* (Qld) s 9(2)(o).
87. Hennessy A, 'Indigenous Justice – Indigenous Laws at the Colonial Interface' (Paper presented at the LAWASIA Down Under conference, Gold Coast, March 2005) 2.
88. Ibid 6.
89. Ibid.

Victoria

The first Koori Court in Victoria was established in Shepparton in August 2002 following extensive consultation with members of the Aboriginal community and other stakeholders under the framework of the Victorian Aboriginal Justice Agreement.⁹⁰ Unlike other jurisdictions there is a legislative framework for the operation of Koori Courts in Victoria: the *Magistrates' Court (Koori Court) Act 2002* (Vic). This legislation establishes the Koori Court Division of the Magistrates' Court with the objective of increasing the participation of the Aboriginal community in the sentencing process, in particular, through the role of Aboriginal Elders and respected persons.⁹¹ Other objectives of the court are to reduce the over-representation of Aboriginal people in the criminal justice system; reduce re-offending; decrease the rate of non-appearances by Aboriginal people; and have a positive impact on the lives of those people who appear in the court.⁹²

The Koori Court can only deal with matters where there has been (or will be) a plea of guilty or where the defendant has been convicted and the defendant consents to being dealt with by the court. Sexual offences and certain family violence matters are excluded from the jurisdiction of the court.⁹³ The proceedings are required to be as informal as possible and there is a requirement under the legislation that the court is to endeavour to make the proceedings understood by not only the defendant and his or her family but also by any member of the Aboriginal community who is present.⁹⁴ The magistrate, defendant, prosecutor and Elders sit around an oval table: all of the traditional formalities associated with mainstream courts have been removed.⁹⁵ The procedure adopted by the Koori Court ensures that all parties are given an opportunity to speak, including the victim.⁹⁶ The Koori Court employs an Aboriginal

justice worker who provides advice to the magistrate, makes enquiries, liaises with local community service providers and consults with all participants.⁹⁷

The inaugural Koori Court magistrate has observed that one of the implied objectives of the court is to 'enhance the prestige' of Elders and respected persons.⁹⁸ An Aboriginal Elder or respected person sits alongside the magistrate; he or she speaks directly to the offender and confers openly and audibly with the magistrate in relation to the appropriate options.⁹⁹ As is the case for all of the current models of Aboriginal courts in Australia, the magistrate retains the ultimate sentencing power. The same sentencing laws and principles which apply to all offenders under Victorian law affect Aboriginal offenders who appear before the Koori Court.¹⁰⁰ The legislation provides that the Koori Court *may* consider any oral statement made to it by an Aboriginal Elder or respected person as well as information provided by other parties including the Aboriginal justice worker.¹⁰¹ This can be contrasted to the position in Queensland where sentencing courts *must* consider such information. The legislation provides that the Secretary of the Department of Justice may appoint a member of the Aboriginal community as an Aboriginal Elder or respected person.¹⁰² The Commission draws attention to the difficulties associated with non-Aboriginal people selecting or appointing Elders.¹⁰³

A review of the operation of the first two years of the Koori Court in Victoria is currently being undertaken, but early feedback indicates that there has been a reduction in the failure to appear in court, a reduction in recidivism and benefits from the involvement of the Elders, and the greater participation of the offender and others present.¹⁰⁴ The Koori Court model has been extended to Broadmeadows and Warrnambool and there are plans for a court at Mildura.¹⁰⁵ The apparent success of this initiative in the adult jurisdiction has

90. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 20–23.

91. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.

92. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 19.

93. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 4F.

94. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 4D.

95. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7, 24 & 28.

96. *Ibid* 30.

97. *Ibid* 26.

98. *Ibid* 19.

99. *Ibid* 31.

100. Edney R, 'The Koori Court Division of the Magistrates Court of Victoria: Philosophy, aims and legislative scheme' (2003) 3(6) *Criminal Law News Victoria* 2.

101. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 4G.

102. *Magistrates' Court (Koori Court) Act 2002* (Vic) s 7.

103. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

104. Auty K & Briggs D, 'Koori Court Victoria: *Magistrates Court (Koori Court) Act 2002*' (2004) 8 *Law Text Culture* 7 32–33. See also Hon Halls Attorney-General, Victoria, *Hansard*, Legislative Assembly, 18 November 2004, 1758 where it was stated that figures show that approximately 200 defendants had been through the Koori court and there were only about 18 cases of recidivism so far.

105. 'Mildura Koori Court Set to Operate from July', *ABC News Online*, 20 April 2005: see <<http://www.abc.net.au/news/newsitems/200504/s1349448.htm>>.

resulted in the establishment of a Children's Koori Court and the *Children and Young Persons (Koori Court) Act 2004* (Vic).¹⁰⁶

New South Wales

In New South Wales a trial of circle sentencing commenced in Nowra in February 2002 and due to its success it has been extended to other parts of the state.¹⁰⁷ The Aboriginal Justice Advisory Council was responsible for the implementation of the trial in conjunction with the local magistrate. While the circle sentencing model was based on the Canadian experience,¹⁰⁸ it was adapted to suit New South Wales with sufficient flexibility to allow further changes to suit the local circumstances of specific Aboriginal communities.¹⁰⁹

The objectives of the circle sentencing court include increasing the participation of Aboriginal communities, Aboriginal offenders and victims in the sentencing process; reducing barriers between the Aboriginal community and courts as well as increasing confidence in the sentencing process; and reducing re-offending by Aboriginal people by providing more effective sentencing options.¹¹⁰ Circle sentencing incorporates aspects of restorative justice by aiming to repair the harm that has been caused by the offence.¹¹¹ The effect of the eligibility criteria, which includes that the offender must be likely to receive imprisonment, is that the court operates at the higher end of criminal behaviour dealt with at the magistrate level.¹¹²

The parties present during the circle proceedings are the magistrate, Aboriginal Elders, the defendant and any support persons, the victim and support persons, the prosecutor, defence counsel, other community members, local service providers and the Aboriginal project officer.¹¹³ The magistrate's role is to ensure that the proceedings take into account legal requirements and in particular that the sentence suggested by the circle falls within the acceptable range.¹¹⁴ The Aboriginal project officer is employed to liaise with all participants and provides administrative functions.¹¹⁵ When the circle convenes the process is informal: participants use plain language and many of the formal features of a traditional court, such as robes, are absent. Everyone is given an opportunity to speak, including the victim. The aim is that the circle will come to an agreement about the appropriate penalty, although the magistrate retains ultimate discretion.¹¹⁶

The involvement of members of the Aboriginal community is twofold. The Community Justice Group is required to assess the suitability of an Aboriginal offender who has been referred by the magistrate for inclusion in the circle sentencing court and recommends the appropriate Aboriginal Elders to participate in the circle.¹¹⁷ During the circle sentencing process, Elders are present and provide significant input in relation to the offender and his or her community. The involvement of Elders has been considered to be the greatest strength of the process and offenders who have participated described the positive effect of Elders on their appreciation of Aboriginal culture and general respect for the sentencing process.¹¹⁸ An additional

106. This legislation has provisions which are based upon the legislation for adults.

107. 'Regions to Adopt Circle Sentencing', *ABC News Online*, 6 May 2005. The report notes that by the end of 2005 it is expected that it will be operating in nine locations: see <<http://www.abc.net.au/news/newsitems/200505/s1361156.htm>>. The circle sentencing scheme in New South Wales was developed after the NSWLRC report, *Sentencing Aboriginal Offenders*, recommended pilot schemes for circle sentencing and adult conferencing. This report considered that such schemes should be developed in 'consultation and collaboration with Aboriginal communities' and that if such schemes were to be incorporated into the criminal justice system this should be done by broad and flexible legislation in order to ensure procedural safeguards and consistency. See NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 108, 128–31.

108. Circle sentencing originated in Canada in 1992 as a result of the decision of Stuart J in *R v Moses* (1992) 71 CCC (3d) 347 where he recommended greater involvement by the community in the sentencing process: see Thomas B, *Circle Sentencing: Involving Aboriginal communities in the sentencing process*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 1998) 7. Circle sentencing in Canada has been extended to many parts of Canada, including urban areas: see McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5, 7.

109. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 3–4.

110. *Ibid* 4.

111. Thomas B, *Circle Sentencing: Involving Aboriginal communities in the sentencing process*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 1998) 5. See further discussion under 'Sentencing – Restorative Justice', below p 224.

112. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 5. It is noted that the court can still impose imprisonment if considered appropriate and that certain sexual offences and serious drug offences are excluded.

113. *Ibid* 7.

114. *Ibid* 5–6.

115. *Ibid* 5.

116. *Ibid* 6–10, and note that procedural matters are set out in the *Criminal Procedure Regulations 2000* (NSW) sch 3.

117. *Criminal Procedure Regulations 2000* (NSW) sch 3, Pt 6. Note that the Minister appoints the members of a community justice group on the recommendation of the Aboriginal project officer for the relevant court.

118. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 43–44.

benefit is that the involvement of the Elders has empowered the Aboriginal community in a general sense. In one community, the Elders have developed their own mini-circle to deal with family disputes.¹¹⁹ A review of the Nowra circle sentencing court concluded that the process provides a mechanism where local Aboriginal people can actively take responsibility for their own local problems, where they are given authority to make decisions about solutions to their problems and are empowered to implement them.¹²⁰

The Commission acknowledges the benefits of the involvement of local Aboriginal communities in the administration of criminal justice. As observed by Brendan Thomas, circle courts are able to 'incorporate the values and culture of the local community'.¹²¹ However, it needs to be remembered that the circle sentencing model, which appears to provide the most direct input into decisions about sentencing, does not give Aboriginal communities the right to impose their own sentencing options nor the ability to impose customary law sanctions. The magistrate retains the ultimate power and the circle involves other parties who are not Aboriginal people. The Commission draws attention to its proposal for community justice groups as a more effective model to achieve these goals.

Northern Territory

An Indigenous court has been recently introduced in Darwin and is referred to as the Darwin Community Court. It operates at the level of a magistrates court and is limited to sentencing matters for non-violent offences. Once the court is in session the magistrate and Elders enter together; all parties including the victim (and any supporters) then sit in a circle format and each person is permitted to speak.¹²² It is claimed that this court utilises the concept of shame that has operated as a means of social control in traditional Aboriginal society.¹²³

Australian Capital Territory

A pilot circle sentencing court began in Canberra in April 2004 and is known as the Ngambra Court. When an Aboriginal person appears in a general magistrates court, he or she can apply to be dealt by the Ngambra Court. An applicant can only be accepted to the program if he or she has a kinship or association with the Canberra Aboriginal and Torres Strait Islander community and the Elders' Panel considers that it is an appropriate case for a sentencing circle.¹²⁴ If accepted, the offender will participate in a sentencing circle which includes the magistrate, four Aboriginal Elders, the prosecutor, the defence lawyer and the victim (if he or she consents). After a lengthy session, the circle recommends the appropriate sentence to the magistrate; this will often involve the offender being sentenced under the supervision of their own community.¹²⁵ The magistrate is not obliged to accept the recommendation of the circle, but if he does so the magistrate can only impose that sentence if the offender consents.¹²⁶ The Ngambra Court aims, amongst other things, to increase the involvement of Aboriginal people in sentencing and provide culturally relevant and effective sentencing options.¹²⁷ In May 2005 the Australian Capital Territory government announced that a trial of this initiative will continue.¹²⁸

Key Features of the Australian Aboriginal Court Models

Due to the diversity of Aboriginal communities throughout Australia the exact procedures that have developed for each Aboriginal court differs; however, there are a number of key features evident from the above discussion. While it is important to consider these features in devising a model for Aboriginal courts in Western Australia, each local Aboriginal community must be consulted in relation to the structure that is best suited to their needs and circumstances.

119. Ibid 48.

120. Ibid 53.

121. Thomas B, *Circle Sentencing: Involving Aboriginal communities in the sentencing process*, Discussion Paper (Sydney: Aboriginal Justice Advisory Council, 1998) 7.

122. Carbonell R, 'Indigenous Court Launched in the NT', *ABC Online*, 19 August 2005: see <<http://www.abc.net.au/worldtoday/context/2005/s1348834.htm>>; Payne S, *The Darwin Community Court: Circle Sentencing in the Top End* (Paper presented at Youth Justice: A Crime Prevention Forum, Darwin, 4-6 May 2005) 1-2.

123. Payne S, 'The Darwin Community Court: Circle Sentencing in the Top End' (Paper presented at Youth Justice: A Crime Prevention Forum, Darwin, 4-6 May 2005) 6-7.

124. Ngambra Circle Sentencing Court, Final Practice Direction, 4-6: see <<http://www.courts.act.gov.au/Magistrates/Practice%20Direction%20Final%2021st%20April%202004.pdf>>.

125. Australian Capital Territory Government, *Aboriginal Justice Initiative to Continue* (2005-2006 Budget Media Release, 3 May 2005).

126. Ngambra Circle Sentencing Court Final Practice Direction, 9: see <<http://www.courts.act.gov.au/Magistrates/Practice%20Direction%20Final%2021st%20April%202004.pdf>>.

127. Ibid 1.

128. Ibid.

Physical Layout

Generally, Aboriginal courts have a different physical layout than a mainstream court. Some employ a circle layout while others have all parties (including the magistrate) sitting at the same level. In addition, the Elders or respected persons sit next to the magistrate, indicating their importance in the process. The effect is the abolition of the hierarchical and elevated position of the judicial officer. As well as changing the physical layout of the court, Aboriginal artefacts and the Aboriginal flag are sometimes displayed and magistrates generally acknowledge Aboriginal custodianship of land and pay respect to the Aboriginal Elders.¹²⁹

Informal Procedure and Communication

Aboriginal courts encourage better communication between the judicial officer, the offender and other parties involved in the process and place less reliance on the adversarial roles of the defence counsel and the prosecutor.¹³⁰ Proceedings are informal and use of legal jargon is discouraged. In some cases Elders communicate to the defendant in their own language. It is well known the many Aboriginal people have faced difficulties understanding court proceedings as a result of language barriers and a general sense of alienation from the criminal justice system. The Commission supports the use of informal procedures and the avoidance of technical legal terminology. While this approach will no doubt assist in promoting a better understanding of court processes by Aboriginal defendants and community members, it is important that they also have a voice in the proceedings.

Resource Intensive

An examination of the various models for Aboriginal courts indicates that while they are significantly less formal than mainstream courts they are certainly more resource intensive. Circle sentencing, in particular, can take anywhere from two hours to up to an entire day

for one matter compared to a matter of minutes in a typical magistrates court.¹³¹ As Blagg observes, circle courts are also generally more 'labour intensive' than the Aboriginal court models such as the Koori Court.¹³² It is accepted by the Commission that any form of Aboriginal court would be more resource intensive than mainstream courts and this is reflective of a process which allows greater participation by all parties and encourages a holistic approach to the offender's circumstances. If in the long-term Aboriginal courts prove to be successful in terms of reoffending, reducing over-representation and importantly, improving the satisfaction of Aboriginal people with the justice system, then Aboriginal courts will be truly cost effective.

Jurisdiction

Currently, all Aboriginal courts in Australia operate at the level of a magistrates court.¹³³ However, in *R v Scobie* the Supreme Court in South Australia adopted a process which is similar to that used in Aboriginal courts.¹³⁴ This case dealt with the sentencing of a traditional Pitjantjatjara man and during the sentencing proceedings the court attended the Anangu Pitjantjatjara lands where the judge spoke with community members as to their views and took into account statements by two Aboriginal Elders.¹³⁵ There is no reason in principle why a superior court could not sit as an Aboriginal court and certainly, as occurs with the GASR, an Aboriginal court could be involved in bail and other pre-sentencing matters for cases which must be dealt with by a superior court at a later date. While most Aboriginal courts operate in the adult jurisdiction, there are Aboriginal courts for children in Victoria, Queensland and South Australia. As the justification for Aboriginal courts is predominantly the over-representation of Aboriginal people within the criminal justice system and the statistics in Western Australia are even more disturbing for Aboriginal children than for adults, these courts should be extended to juveniles. The Commission notes that its proposal in relation to changes to the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) that require a court

129. Auty K & Briggs D, 'Koori Court Victoria: Magistrates Court (Koori Court) Act 2002' (2004) 8 *Law Text Culture* 727–29; Hennessy A, *Indigenous Justice – Indigenous Laws at the Colonial Interface* (Paper presented at the LAWASIA Down Under Conference, Gold Coast, March 2005) 7.

130. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 5.

131. Potas I, Smart J, Brignell G, Thomas B & Lawrie R, *Circle Sentencing in New South Wales: A review and evaluation* (Sydney: Judicial Commission of New South Wales, October 2003) 51.

132. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 38.

133. It has been noted that there are plans for an Indigenous District Court at Ipswich, Queensland: Marchetti E & Daly K, *Indigenous Courts and Justice Practices in Australia* (2004) 277 *Trends and Issues* 2.

134. *R v Scobie* [2003] SASC 85.

135. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 118.

to consider submissions made by a community justice group or a respected Elder¹³⁶ will ensure that all courts are informed, where appropriate, about Aboriginal customary law and other cultural matters. This will not be dependant upon whether there is an Aboriginal court in a particular jurisdiction.

Aboriginal courts operate only in respect of sentencing matters and require either a conviction or an indication that the accused intends to plead guilty. Considerations in relation to bail will only fall within the jurisdiction of an Aboriginal court if the matter is going to proceed to sentencing. The Commission's proposal in relation to amendments to the *Bail Act 1982* (WA) requiring courts to take into account the submissions of a community justice group or respected Elder will alleviate this problem.¹³⁷ In other words, the Commission acknowledges that Aboriginal courts cannot operate in all places, in all jurisdictions and for all matters. A member of a community justice group or an Elder can, where appropriate, provide advice to a court in relation to bail and sentencing and potentially give evidence during trials in relation to Aboriginal customary law matters.

Enabling Legislation and Establishment

While the Nunga Court in South Australia and initiatives in regional Western Australia were developed as a result of the industry of individual magistrates, the Aboriginal courts in Victoria and Queensland and the circle sentencing court in New South Wales evolved as a result of negotiations between the government and the Indigenous community.¹³⁸ In the locations where there is specific government support for Aboriginal courts, legislation has been enacted. Victoria has opted for specific legislation covering the operation of the Koori Court in both the adult and juvenile jurisdictions.¹³⁹ New South Wales has regulations dealing with certain procedures in the circle sentencing court and Queensland has the legislative requirement for courts to take into account submissions from community justice groups in sentencing and bail matters. There

are plans in South Australia to enact legislation which will allow any court to convene a sentencing conference and this legislation includes a provision that the court may include an Aboriginal Elder or respected person to provide cultural advice in relation to sentencing matters.¹⁴⁰

The extensive involvement of judicial officers in the development of Aboriginal courts is not unique to Australia. Circle sentencing in Canada has been referred to as a 'joint venture' between the judiciary and the First Nations communities.¹⁴¹ It has been argued that this is both a positive and a potentially negative feature: the flexibility of the approach allows individual communities to shape their own practices while, on the other hand, it leaves the entire scheme vulnerable to changes to the judicial officer. This is a factor which the Commission has taken into account when considering the need for a formal policy or legislative base for Aboriginal courts in Western Australia.¹⁴²

Aboriginal Court Workers

Some jurisdictions have incorporated the role of an Aboriginal justice officer or worker who is able to make enquiries with other organisations and the Aboriginal community, provide support to all participants and in some cases play an active role in the court proceedings. The Commission supports this concept in order to provide an effective link between the general criminal justice system and the Aboriginal community.

Aboriginal Elders

The extent of the involvement of Aboriginal Elders or respected persons differs from court to court. In some courts Elders play a significant role in speaking to the offender about their conduct and its effects on others, particularly their own community. Mainstream courts are presided over by persons of authority with which Aboriginal people generally have no connection.¹⁴³ The presence of Elders or respected persons in court can be effective in imparting a positive and constructive notion of shame (as a result of Indigenous people

136. See discussion under 'Evidence of Aboriginal Customary Law and Sentencing', below pp 221–24.

137. See discussion under 'Bail – Personal Circumstances of the Accused', below pp 196–97.

138. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice* 26, 31–32.

139. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends and Issues* 2.

140. Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 7. The *Statutes Amendment (Intervention Programs and Sentencing Procedures) Bill 2005* (SA) was read a second time in the Legislative Council on 17 February 2005.

141. McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5.

142. *Ibid* 5.

143. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 36.

speaking to and supporting an offender), rather than from a more distant legal authority who may make offenders feel afraid and bad about themselves.¹⁴⁴ Aboriginal Elders also provide valuable information to the judicial officer in relation to the offender's background, cultural matters and sometimes advice as to the appropriate sentencing options.¹⁴⁵

Difficulties have been identified as a result of potential conflicts of interests when the offender and the Elder are connected by family or kin ties. This is especially relevant in remote communities.¹⁴⁶ This is one of the main reasons why the ultimate sentencing authority is retained by the judicial officer in all Aboriginal courts.¹⁴⁷ As the ALRC highlighted, the specific aspects of Aboriginal social structures present 'real difficulties in setting up courts which vest power in specified persons'.¹⁴⁸ There are important considerations in relation to the appointment or selection of Elders or respected persons to sit in Aboriginal courts. As has been identified there may be a 'perception of bias in the appointment of certain persons to the position of elder and their role might subsequently become politicised and divisive'.¹⁴⁹ The Commission found during its consultations that there was strong opposition to the selection or appointment of Aboriginal Elders by government agencies.¹⁵⁰ The Commission notes that in Victoria, Elders or respected persons are appointed by the Secretary of the Department of Justice¹⁵¹ and in New South Wales they are appointed by the Minister after a recommendation by the Aboriginal project worker. The Commission considers that the selection of Elders or respected persons should be made by the local Aboriginal community and that the establishment of community justice groups in Western Australia will provide an effective panel of Elders for nomination or appointment to a court.

Effectiveness

While it is still too early to judge the success of Aboriginal courts, especially in terms of recidivism, there are positive signs that these courts have achieved significant gains in terms of justice outcomes for Aboriginal people. Participation rates are significantly improved. It is well known that Aboriginal people have a high rate of non-appearance and both the Nunga Court and the Koori Court have experienced improved rates of court attendance.¹⁵²

Critics have expressed the view that these courts are soft options; however, others highlight that the process of Aboriginal people facing their Elders is certainly not a soft option.¹⁵³ It appears that there have only been three appeals from decisions made in Aboriginal courts.¹⁵⁴ The most pertinent observation in this regard was made by Nyland J in one of these cases: although the Nunga Court was established 'to allow a more creative approach to be taken' when sentencing Aboriginal people, the court remains 'subject to the usual sentencing principles'.¹⁵⁵ Therefore, any concerns that Aboriginal courts may impose penalties which are too lenient are misguided. They operate within the same justice system as any court, and both the prosecution and the defence are entitled to appeal against any perceived sentencing errors. Aboriginal people that appear before an Aboriginal court will be subject to the same sentencing principles that apply to non-Aboriginal people as well as the specific principles which have been adopted by general courts in relation to characteristics or factors associated with Aboriginality.¹⁵⁶

The active involvement of Aboriginal people results in a more meaningful court experience.¹⁵⁷ As a consequence of the involvement of Elders, Aboriginal defendants are more likely to comply with the decision

144. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 5.

145. *Ibid.*

146. *Ibid.*

147. Similarly, the ultimate sentencing authority is retained with the judiciary in sentencing circles in Canada: see McNamara L, 'Indigenous Community Participation in the Sentencing of Criminal Offenders: Circle Sentencing' (2000) 5(4) *Indigenous Law Bulletin* 5.

148. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [802].

149. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice* 26, 35.

150. See discussion under 'The Commission's Proposal for Community Justice Groups – Membership', above pp 134–35.

151. For the Koori court, the positions of Elders and respected persons were advertised; the applicants were required to address selection criteria and participate in interviews: see Department of Justice, *A Discussion Paper on Aboriginal Courts* (Perth, 2005) 11.

152. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) *Trends and Issues* 5.

153. *Ibid.*

154. *Onus v Sealy* [2004] VSC 396 which dealt primarily with procedural issues which occurred in the Magistrates Court before the matter was dealt with by the Koori Court; *Police v Koolmatrrie* [2002] SASC 47 which involved an appeal against the inadequacy of an order for the disqualification of the defendants driver's licence imposed in the Nunga court; and *Police v Carter* [2002] SASC 48 which dealt with an appeal against the inadequacy of the sentence imposed by the Nunga Court. In this later case the appeal was upheld and the term of imprisonment which had originally been ordered to be served concurrently was then ordered to be served cumulatively.

155. *Police v Carter* [2002] SASC 48 [16].

156. See 'Aboriginality and Sentencing', below pp 202–12.

157. Marchetti E & Daly K, 'Indigenous Courts and Justice Practices in Australia' (2004) 277 *Trends and Issues* 5.

of the court and change their behaviour and Aboriginal communities are strengthened by the reinforcement of the traditional authority of Elders. The Commission highlights that no-one is required to participate in the process. This is especially relevant for the accused: an Aboriginal person must have the right to elect not to be dealt with in an Aboriginal court.

The Commission's View

As identified in the beginning of this section, Aboriginal courts are not based on Aboriginal customary law.¹⁵⁸ While Aboriginal courts may be effective in reducing over-representation, they should not be considered as the 'definitive answer to curbing the rates of Indigenous over-representation in the prison system'.¹⁵⁹

While recognising the potential of Aboriginal courts to make the existing criminal justice system more responsive to the needs of Indigenous communities (without requiring a fundamental change to the existing processes), it should be emphasised that they are still part of the non-Indigenous system.¹⁶⁰

The Commission considers that its proposal in relation to community justice groups is the appropriate vehicle for the practical recognition of Aboriginal customary law and envisages that once established, these groups in discrete communities will be empowered to deal with law and order issues on their own terms (subject to the constraints of Australian law). Community justice groups in all locations will also have a role in advising courts about Aboriginal customary law and cultural issues. This can be done at the instigation of the parties, the community justice group or the court. The question therefore remains: is there a need for Aboriginal courts in Western Australia? In the Commission's view, the answer is, 'Yes'. The Commission considers that Aboriginal courts in Western Australia will assist in reducing the numbers of Aboriginal people in custody for a number of reasons:

- Aboriginal courts are potentially more sensitive to cultural and Aboriginal customary law issues than general courts and unless and until there are functioning community justice groups in all locations, Aboriginal courts will be an important mechanism

for ensuring that the Australian criminal justice system is informed accurately about these issues.

- Due to the informal nature of the court process and the more culturally appropriate physical setting, Aboriginal courts have the potential to eliminate many of the barriers that have existed between Aboriginal people and the legal system. As John Toohey has noted, many Aboriginal people criticise the administration of the criminal justice system and the lack of Aboriginal input, rather than the substance of Australian law.¹⁶¹
- Aboriginal Elders may be a more effective authority structure than a non-Aboriginal judicial officer in terms of impacting on the offender's behaviour and encouraging compliance with orders of the court.
- The process of encouraging active participation by the offender, the Elders, the victim and the community as well as the involvement of the Aboriginal justice worker results in a more meaningful dialogue about the possible options available to reduce that person's risk of reoffending in the future.
- The role of Aboriginal Elders and respected persons provides a symbolic recognition of their traditional authority and will therefore contribute to their ability to maintain social control in their communities.

In respect of the term of reference whether the practices and procedures of Western Australian courts should be modified to recognise Aboriginal customary laws, the Commission is of the view that there should be a formal government policy to establish Aboriginal courts in this state. While the Commission commends the efforts of individual magistrates in Western Australia, for the long-term sustainability of Aboriginal courts a commitment by government in terms of resources and formal policy is needed. If the issue is left to individual magistrates it runs the risk that these initiatives will fall way with changes to personnel. The Commission is of the view that pilot Aboriginal courts should be established in Perth and regional locations. In this regard it is important to recognise that there is a benefit in reconnecting Aboriginal people who are not from remote areas to their cultural values¹⁶² and that it is

158. Blagg H, *A New Way of Doing Justice Business? Community Justice Mechanisms and Sustainable Governance In Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 35.

159. Harris M, 'From Australian Courts to Aboriginal Courts in Australia – Bridging the Gap?' (2004) 16(1) *Current Issues in Criminal Justice* 26, 30.

160. *Ibid* 38.

161. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project 94, Background Paper No 5 (September 2004) 17.

162. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 128.

not just Aboriginal people from remote traditional areas who feel alienated from the criminal justice system. Possible locations for pilot Aboriginal courts identified during the Commission's consultations include Geraldton, Wuggabun, Laverton, Bunbury and the Pilbara. It is important to note that Aboriginal communities in these areas supported different models – some preferred the Koori court model while others favoured circle sentencing. The pilot project to establish Aboriginal courts



should ensure that there is extensive consultation with the relevant Aboriginal community about how they would like the Aboriginal court in their area to operate, whether any particular offences should be excluded (especially during the pilot stage) and what would be the appropriate method for selecting Elders to sit on the court (bearing in mind the Commission's view that they should be selected by their own community). The Commission also considers that a pilot Aboriginal court should be set up in the Children's Court.

The Commission does not consider that it is necessary to legislate for pilot Aboriginal courts. It may be necessary for legislation to be developed after the pilot stage is completed; however, this would be a matter for the Aboriginal community and the Aboriginal courts to consider after they have operated for some time. The provisions of the *Sentencing Act 1995 (WA)* and the *Sentencing Regulations 1996 (WA)* allow a speciality court to be prescribed.¹⁶³ The *Magistrates Court Act 2004 (WA)* also authorises the Chief Magistrate to establish a separate division of the Magistrates Court at any location to deal with a specified class of offenders.¹⁶⁴ These legislative provisions could be used to prescribe a particular Aboriginal court in a specified location or establish an Aboriginal court division of the Magistrates Court. The Commission suggests that pilot Aboriginal courts should operate for two years in their respective locations. At the end of that period, the courts should be independently evaluated with reference to not only recidivism and attendance rates, but also the impact upon the participants and the Aboriginal community.

In conclusion, the Commission highlights that its proposal for Aboriginal courts and its proposal for community justice groups, although capable of operating independently from one another, together offer a system where the Aboriginal people of this state can practise their own customary laws with as little interference as possible, while at the same time providing a more meaningful and effective criminal justice system. In tandem, these initiatives can aim to reduce the mass imprisonment of Aboriginal people in this state – a situation which is unacceptable for the quality of life of Aboriginal people as well as a factor which contributes to the further destruction of Aboriginal customary law and traditions.

Proposal 19

That the Western Australian government establish as a matter of priority pilot Aboriginal Courts for adults and children in the metropolitan area and, subject to the views of the relevant Aboriginal communities, in other locations across the state.¹⁶⁵ This pilot project must ensure adequate consultation with Aboriginal communities and other stakeholders and be sufficiently resourced and supported by government departments.

After two years of operation each Aboriginal court should be evaluated independently and consideration given to whether any legislative changes are required and whether any particular courts should be afforded permanent status.

163. Note that the Drug Court in the Perth Magistrates Court is currently the only prescribed speciality court. The effect of being classified as a speciality court is that the court has the power to impose a presentence order under Part 3A of the *Sentencing Act 1995 (WA)*, which can operate for up to two years, for matters where imprisonment is likely. Otherwise any court can only adjourn sentencing for up to six months after conviction: see *Sentencing Act 1995 (WA)* s 16.

164. *Magistrates Court Act 2004 (WA)* ss 24, 25.

165. It is the Commission's view that the pilot Aboriginal Court for adults should initially be established in the Magistrates Court.

Criminal Responsibility

Under Australian law criminal responsibility, which means that a person is liable to punishment for an offence, is determined by assessing three possible elements:

- the act or omission that constitutes the offence;
- any mental element such as intention or wilfulness; and
- any defence that may be applicable in the circumstances.¹

As discussed earlier in this Part, there may be some aspects of Aboriginal customary law that are considered unlawful under Australian law.² For example, the traditional punishment of spearing may, in some cases, constitute an offence of unlawful wounding or grievous bodily harm. Therefore, the question arises whether there is any scope to recognise Aboriginal customary law when determining the criminal responsibility for an offence under Australian law.

While aspects of Aboriginal customary law have been considered in the past by Australian courts in the context of criminal responsibility, judicial consideration of Aboriginal customary law has been far more prevalent in respect of sentencing.³ There is currently no defence of general application that absolves a person of criminal responsibility because the conduct was done in

accordance with Aboriginal customary law.⁴ In order for Aboriginal customary law to be taken into account in deciding criminal responsibility it must 'somehow fit into one of the mainstream defences'.⁵

Defences Based on Aboriginal Customary Law

General Defence

Traditional physical punishments that have the potential to breach Australian law continue today.⁶ As a result, those Aboriginal people who are required under Aboriginal customary law to order or carry out the punishment face the dilemma of following their obligations under Aboriginal customary law or complying with Australian law.⁷ Failure to obey either law may result in punishment. In its 1986 report on recognition of Aboriginal customary law, the ALRC considered whether there should be a general defence that would excuse liability under Australian law for any offence that resulted from conduct required by Aboriginal customary law. Bearing in mind that such a defence would inevitably apply to homicide, it did not support that approach.⁸ It was suggested in submissions to the ALRC that a Aboriginal customary law defence for particular

1. The term 'defence' is commonly used; however, it is somewhat misleading. For general defences such as self-defence, provocation and honest claim of right the obligation is on the prosecution to prove beyond a reasonable doubt that it does not apply. For others, in particular specific defences set out in the legislative provision which creates the offence, the defendant is required to prove (on the balance of probabilities) that the defence has been made out.
2. See discussion under 'Conflict with Australian Law', above pp 92–93.
3. Geoffrey Eames has highlighted that arguments based on Aboriginal customary law that have been put forward to support a defence have rarely been successful compared to similar arguments put forward during the sentencing process. See Eames G, 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' In Strang H & Gerull S (eds), *Homicide: Patterns, Prevention and Control*, Conference Proceedings No 17, 12–14 May 1992 (Canberra: Australian Institute of Criminology, 1993) 153.
4. In *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78, 80 (Doyle CJ; Cox and DeBelle JJ concurring) it was held that on the basis of the decision in *Walker v The State of New South Wales* (1994) 126 ALR 321 it was not possible for the defendants to argue that their conduct was lawful because it was done in accordance with Aboriginal customary law. Instead, it would be necessary for the defendants to argue that as a consequence of Aboriginal customary law they were acting under duress – a defence that is generally available.
5. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 15.
6. See discussion under 'Consent', below pp 163–72.
7. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [448]. In his background paper to the current reference, Philip Vincent recommended that there should be a defence in the *Criminal Code* (WA) available to all offences (other than homicide, grievous bodily harm and sexual assault) to the effect that those persons who act 'in execution of Aboriginal customary law, and those who act in obedience to orders from those in authority under and in accordance with Aboriginal customary law, are protected from criminal responsibility'. See Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 22. Similarly, Greg McIntyre suggested a defence for people administering traditional punishments provided that the punishment was voluntarily accepted; that it was carried out in accordance with Aboriginal customary law; and that it did not breach international law standards. See McIntyre G, *Aboriginal Customary Law: Can It Be Recognised?* LRCWA, Project 94, Background Paper No 9 (February 2005) 46.
8. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [447]. The Commission notes that the ALRC also rejected the option for a general cultural defence (applicable to all cultures) on the basis that it would 'violate the principles of equality before the law and equal protection of the law'. See ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 171.

offences, including offences that arose as a consequence of traditional punishments such as spearing, would be more appropriate. It was argued that without a defence which acknowledged the obligation under Aboriginal customary law to impose traditional punishment, the recognition of Aboriginal customary law would be uncertain. This is because it would be reliant upon whether the existing defences under Australian law permitted consideration of Aboriginal customary law.⁹ The ALRC did not support a general customary law defence (either applicable to all offences or only to some offences) because:

- in practice such cases rarely come before the court;
- it would be difficult to formulate a legislative defence that would adequately reflect the many dimensions of Aboriginal customary law and the interpretation of such a defence by the courts would remove customary law from the control of Aboriginal people;¹⁰ and
- it would deprive people, including Aboriginal victims of assault and violence, of the protection of Australian law.¹¹

The ALRC concluded that any injustice could be adequately dealt with either by judicial discretion at the time of sentencing or, in the case of homicide, by the introduction of a legislative provision creating a partial defence of Aboriginal customary law.¹²

There was no indication from the Commission's consultations that Aboriginal people generally supported any separate system of criminal responsibility. Indeed, it was pointed out that 'two laws may be divisive'.¹³ A defence exonerating Aboriginal people for a wide range of offences (including offences of violence) because

the conduct was required under Aboriginal customary law would create different notions of criminal responsibility. Non-Aboriginal people would be liable to punishment under Australian law for certain behaviour and Aboriginal people would not. Further, such a defence would not provide equal protection under Australian law. Aboriginal people are entitled to the same level of protection (from violence and other criminal behaviour) as other Australians. Even if certain serious offences (such as murder, grievous bodily harm and sexual assault) were excluded, such a defence could potentially be relied upon for other offences of violence.

Some aspects of traditional customary law have evolved as a result of the interaction with Australian law. Generally, death is no longer imposed as a form of traditional punishment. In some instances the punishment of spearing has been modified and in some cases has stopped altogether.¹⁴ Megan Davis and Hannah McGlade have observed, in the context of recognition of Aboriginal customary law, that international human rights standards can operate as a 'vehicle for the evolution of culture'.¹⁵ Just as the influence of Australian law has resulted in the modification of some traditional punishments, awareness of international human rights standards may also result in changes to the nature of some traditional punishments. It is arguable that a defence that permits certain behaviour (such as spearing) may operate to stifle the continuing evolution of Aboriginal customary law in contemporary society. The Commission does not support or encourage violent traditional punishments, as to do so may infringe human rights and therefore any defence based on Aboriginal customary law that authorises such practices regardless of the circumstances is unacceptable.¹⁶

9. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [448].

10. This is similar to what was said by the Northern Territory Law Reform Committee in its 2003 inquiry into Aboriginal customary law. It did not recommend any changes to the *Criminal Code* because it considered that this would result in a 'synthetic law that is neither Australian law nor Aboriginal law' and would be incomprehensible by both Aboriginal and non-Aboriginal people. See Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 4–5; NTLRC, *The Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 30.

11. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [449]. In its 1992 report, *Multiculturalism and the Law*, the ALRC affirmed this position when considering the question whether there should be a general cultural defence to absolve criminal liability when a person acting in good faith committed an offence against Australian law on the basis that the act or omission was required by culture or custom. See ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 171.

12. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No 31 (1986) [450].

13. LRCWA, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 21. The Commission notes the observation by the ALRC that the rule that there should be 'one law for all' is not unqualified and that where differential treatment can be justified, special laws may be appropriate. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [168].

14. In some cases spearing (which would usually result in an injury) has been replaced with symbolic spearing where only the ceremonial aspects of the spearing punishment are performed. See discussion under 'Traditional Punishments', above pp 88–92.

15. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA Australia, Project No 94, Background Paper No 10 (March 2005) 76–77.

16. The Commission discusses, in the context of spearing and other physical punishments, the relevance of consent to offences against the person: see 'Consent', below pp 163–72. In circumstances where a person genuinely consents to physical traditional punishment the arguments discussed in this section on separate defences do not necessarily apply.

Partial Defence to Homicide

A difficult issue arises in relation to offences of homicide. Under Western Australian law if a person unlawfully kills another with the intention to kill, that person will be guilty of wilful murder.¹⁷ If a person kills with an intention to cause grievous bodily harm then he or she will be guilty of murder.¹⁸ In both cases there is a mandatory punishment of life imprisonment. Although the court has discretion to determine, within a prescribed range, the minimum amount of time the person must spend in jail before he or she can be considered for release, a sentence of life imprisonment must be imposed regardless of the circumstances of the case.¹⁹

The conflict for Aboriginal people is that if someone dies as a consequence of a punishment imposed pursuant to Aboriginal customary law there is little scope (other than when deciding what should be the minimum term) for taking Aboriginal customary law into account. As discussed earlier in 'Traditional Law and Punishment', intentional death is not a customary law punishment that is widely used or threatened today.²⁰ The main area of conflict is where an Aboriginal person inflicts traditional punishment with the intention to cause grievous bodily harm and death results: in these circumstances the person administering the traditional punishment would be guilty of murder. The Commission notes that the traditional punishment of spearing may or may not involve an intention to cause grievous bodily harm.²¹ The Commission accepts that it is possible that some Aboriginal people could be charged and convicted of wilful murder or murder as a consequence of carrying out a traditional punishment under Aboriginal customary law.

Although it concluded that there should be no general defence, the ALRC supported a partial defence to homicide that would operate to reduce a charge of wilful murder or murder to manslaughter. The ALRC concluded that the main criticisms of a general and absolute defence did not apply to a partial defence.²² Because there would still be a conviction (of manslaughter) the defence would not operate to deprive other people of the protection of the law. A partial defence would recognise that the moral culpability of Aboriginal people who are obliged to impose traditional punishment (that results in a death) is more akin to manslaughter.²³ This is particularly important in those jurisdictions that require a mandatory sentence of life imprisonment for the offence of wilful murder or murder, because without a partial defence there is little scope to take into account customary law issues in mitigation of sentence.²⁴ The ALRC recommended a partial defence in the following terms:

It should be provided that, where the accused is found to have done an act that caused the death of the victim in the well-founded belief that the customary laws of an Aboriginal community to which the accused belonged required that he do the act, the accused should be liable to be convicted for manslaughter rather than murder.²⁵

It is the Commission's view that the potential cases that may fall within the parameters of such a partial defence to wilful murder (and murder) would be rare. One option would be to introduce a partial defence in similar terms to that recommended by the ALRC. The alternative would be to amend the penalties applicable to offences of wilful murder and murder to a maximum of life imprisonment, thus allowing courts to take into account circumstances which significantly reduce the

17. *Criminal Code* (WA) s 278.

18. *Criminal Code* (WA) s 279. For other ways in which a person may be convicted of murder, see full section.

19. Section 90 of the *Sentencing Act 1995* (WA) provides that for a sentence of life imprisonment for murder the minimum term must now be between 7–14 years and for wilful murder it must be between 15–19 years. Section 91 provides that if the sentence (for wilful murder) is strict security life imprisonment, the minimum term is to be between 20–30 years. What this means is that after the offender has served the minimum term he or she is eligible to be considered for release. The parole board must first recommend to the Attorney General that he or she is suitable for release. If the Attorney General recommends to the Governor that the offender should be released then the Governor has the final word. See *Sentencing Administration Act 2003* (WA) ss 25, 26. In some other states the punishment for murder is a maximum term of life imprisonment, and therefore in those states the courts can take into account the circumstances of the offence and in particular whether the person was acting in pursuance of Aboriginal customary law: see, for example, *Crimes Act 1958* (Vic) s 3.

20. See discussion under 'Traditional Punishments – Examples of Traditional Punishments', above pp 89–92.

21. See discussion of spearing under 'Consent', below pp 163–72.

22. However, the ALRC accepted that some of the arguments against a general defence (in particular, that it would be difficult to prove and may result in unwanted examination by courts into aspects of Aboriginal customary law) would still apply to a partial defence. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [452].

23. *Ibid* [451].

24. *Ibid*.

25. *Ibid* [453]. This defence incorporates a subjective element: that the accused must genuinely have believed that his or her actions were required under customary law. It also includes an objective element: that the belief was well-founded in the customary laws of the community. The ALRC also recommended that Aboriginal customary law should be considered where relevant as mitigation for offences which would otherwise result in mandatory sentence (in particular life imprisonment): *ibid* [522].

culpability of the offender.²⁶ A benefit of this approach is that its scope would go beyond just the issue of Aboriginal customary law and would apply to all Western Australian people. The Commission is concurrently working on a dedicated reference dealing with the law of homicide, which specifically examines defences and partial defences to wilful murder and murder; the distinction between wilful murder and murder; and the sentencing regime for homicide offences. Given the complexity of these issues and the fact that the law relating to homicide is being separately examined, the Commission invites submissions about the need for a partial defence of Aboriginal customary law to the offences of murder or wilful murder.

Invitation to Submit 4

The Commission invites submissions as to whether there should be a partial defence of Aboriginal customary law that would have the effect, if proved, that a person charged with wilful murder or murder would instead be convicted of manslaughter.

In the alternative the Commission invites submissions as to whether the mandatory penalty of life imprisonment for the offences of wilful murder and murder should be abolished and replaced with a maximum sentence of life imprisonment so that issues concerning Aboriginal customary law can be taken into account in mitigation of sentence where appropriate.

Specific Defences

While the Commission does not support a defence based on Aboriginal customary law that applies to a wide range of offences, a specific defence (or exemption)²⁷ that applies to a particular offence may be appropriate.²⁸ In its 1992 report *Multiculturalism and the Law*, the ALRC recommended that specific



exemptions or defences that take into account cultural or religious issues should only be introduced where the significance of the cultural or religious matter 'outweighs the harm the law seeks to prevent and where the recognition of that freedom by the law poses no direct threat to the person or property of others'.²⁹ In other words, a specific defence may be justifiable if its operation does not significantly interfere with the rights of other people or result in the inadequate protection of other members of society. Taking into account this principle, and in the context of this reference, the Commission considers that there are two areas where specific defences or exemptions may be justified.

- In the area of customary harvesting, the exemption of Aboriginal people from the application of general laws dealing with the regulation of harvesting flora, fauna or fish is entirely appropriate. The need to strengthen the existing exemptions, subject to legitimate conservation interests, is discussed in Part VIII below.³⁰
- In its discussion of community justice mechanisms, the Commission has comprehensively examined the

26. In its recent report on defences to homicide the Victorian Law Reform Commission (VLRC) stated that there should be compelling reasons for the introduction or continuation of partial defences rather than allowing issues of culpability to be taken into account during sentencing. See VLRC, *Defences to Homicide*, Final Report (October 2004) 232.

27. An exemption is a legislative provision that provides that a particular law regulating conduct does not apply to a specified class of person or activity. For example, s 23 of the *Wildlife Conservation Act 1950* (WA) provides that an Aboriginal person is permitted to engage in hunting and foraging (of flora and fauna) on land that is not a nature reserve or wildlife sanctuary for sustenance purposes. This provision is an exception to the general prohibition of taking protected fauna or flora without a licence.

28. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [446]. The ALRC provided examples including that, under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), it is a defence to a charge of entering upon a sacred site or Aboriginal land that the entry was 'in accordance with Aboriginal tradition'. Similarly, s 17 of the *Aboriginal Heritage Act 1972* (WA) provides that it is an offence to damage, destroy, alter, remove, conceal or deal with any Aboriginal site in a manner that is not sanctioned by relevant custom.

29. The ALRC considered that the best way to achieve this was through exemptions set out in the relevant legislation rather than defences that are reliant upon concepts of reasonableness: see ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 177.

30. See Part VIII 'Improving Recognition of Aboriginal Harvesting Rights in Western Australia', below pp 374–82.

current Aboriginal community by-law scheme. Pursuant to this scheme Aboriginal communities are empowered to make by-laws that prohibit certain conduct on their community lands. Some communities have provided that it is a defence to a breach of a by-law that the person was acting in accordance with a custom of the community. The Commission has sought submissions to determine the effectiveness of this defence and how it might be applied to the Commission's proposed offence of trespass.³¹

Intention

Many criminal offences in Western Australia require proof of an intention to cause a specific result.³² For example, a conviction of wilful murder requires proof that the accused intended to cause the death of the victim.³³ Intention is a subjective element; it is what the accused person was thinking at the time of committing the offence. In the absence of direct evidence (in the form of an admission), the intention of the accused will be inferred from the circumstances of the offence.³⁴ In coming to a conclusion about the accused's intention the judge or jury will apply their own 'common sense understanding of human behaviour'.³⁵ The potential danger for Aboriginal people (and for that matter, other cultural minorities) is that the judge or jury may make 'wrong inferences from behaviour unless they have evidence of the customs, practices and beliefs prevalent in the accused's community'.³⁶

Where Aboriginal customary law is considered to be outside the experience of 'ordinary people' evidence of it is admissible if it is relevant to the accused's state of mind or intent.³⁷ As stated by Dowsett J in *R v Watson*³⁸ 'evidence of the peculiarities of a particular

community or a particular person' may be admissible to prove or disprove intention. To justify expert evidence, the characteristics of a particular community or person must depart significantly from what is considered the 'norm'.³⁹ In *R v Watson* the appellant had been convicted of murder after stabbing a woman in the abdomen. The appellant claimed that he did not intend to kill her or to do her grievous bodily harm. Instead he explained that he only meant to cut her as a form of discipline. The Queensland Court of Criminal Appeal held that evidence from a sociologist revealing that Indigenous men in Palm Island regularly 'cut' their wives for the purpose of discipline was not admissible to prove intention. The court held that the issue of whether the accused intended to kill or cause grievous bodily harm was a matter within the range of common experience. The fact that one person may inflict an injury with an intention to kill or cause grievous bodily harm while another only intends to cause minor harm, was not considered unique to Indigenous people of Palm Island.⁴⁰

In its 1992 report on *Multiculturalism and the Law*, the ALRC found that Australian law adequately provides for courts to consider evidence of cultural matters that may be relevant to the question of the accused's state of mind. The difficulty lies in the need to ensure that there is relevant evidence before the court. The ALRC emphasised that because intention is an element that must be proved by the prosecution, it would be unlikely that the prosecution would call evidence that would support the defence. The obligation then falls on the accused to present the evidence either by giving evidence directly or by calling an expert witness.⁴¹ The difficulties posed by the rules of evidence for the reception of information about Aboriginal customary law are discussed in detail below; recommendations

31. See Invitation to Submit 2 (above p 116) and Invitation to Submit 3 (above p 123).

32. For example s 317A(b) of the *Criminal Code* (WA) creates an offence for an assault with an intent to do grievous bodily harm; s 294 (1) creates an offence for doing grievous bodily harm with an intent to do grievous bodily harm; and s 409 (1) creates the offence of fraud which requires an intention to defraud. Section 6(1)(a) of the *Misuse of Drugs Act 1981* (WA) provides that it is an offence to be in possession of prohibited drugs with an intention to sell or supply those drugs to another person. However, s 23 of the Code provides that unless expressly declared to be an element of the offence, intention is irrelevant.

33. *Criminal Code* (WA) s 278.

34. *R v Willmot (No 2)* [1985] 2 Qd R 413, 418–19 (Connolly J). The Commission notes that s 28 of the *Criminal Code* (WA) provides that intoxication can be taken into account when determining whether an accused person had a specific intent. The ALRC did not consider that if an accused was intoxicated this should preclude customary law issues from being taken into account. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [438]. While the Commission acknowledges that generally Aboriginal people do not consider alcohol (and other forms of intoxication) to be part of Aboriginal customary law, the fact that an accused person was intoxicated at the time of an offence should still be able to be taken into account when assessing intention. If the accused person's intention was affected by both alcohol and customary law issues the law is currently flexible enough for a court to give each factor the appropriate weight.

35. Tasmanian Law Reform Institute, *Intoxication and Criminal Responsibility*, Issues Paper No 7 (March 2005) 13.

36. ALRC, *Multiculturalism and the Law*, Report No 57 (1992) 183.

37. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [416].

38. (1986) 69 ALR 145.

39. *Ibid* 166.

40. *Ibid* 152 (McPherson J), 161 (Derrington J), 166 (Dowsett J).

41. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 183.

are made for legislative reform to remove some of the existing impediments to the admissibility of relevant information.⁴²

Consent

Aboriginal people who inflict physical traditional punishment may be guilty of an offence under Western Australian law. Depending upon the nature of the punishment and the degree of physical injury, the person may be charged with assault, assault occasioning bodily harm, unlawful wounding, grievous bodily harm or homicide. For violent offences that require proof of an assault, the consent of the 'victim' may mean that the accused is not held to be criminally responsible. For these offences *lack of consent* must be proved by the prosecution beyond a reasonable doubt. However, consent is irrelevant for the offences of unlawful wounding and grievous bodily harm. The distinction between those offences in which lack of consent is an element and those in which it is not has significant implications for Aboriginal people who inflict physical traditional punishments such as spearing.

In order to properly examine this very complex and controversial issue, it is necessary to consider, from a general perspective, the relationship between consent and violence. Important legal and moral principles are at the heart of this topic. In dealing with this issue in a comprehensive manner the Commission does not want to suggest that physical traditional punishments are the most important aspect of Aboriginal customary law. The Commission does not advocate the use of violence and emphasises that there are many forms of non-violent customary law punishments.⁴³ Nevertheless, the practice of spearing continues today and is an important part of tradition to many Aboriginal people in this state.

The following discussion shows that the current status of our law with respect to consent does not solely affect Aboriginal people: the arbitrary distinctions between assault occasioning bodily harm and unlawful wounding have the potential to affect any Western Australian.

Consent and Violence

Most jurisdictions accept that consent to violent conduct in certain circumstances precludes criminal responsibility. But this is not absolute: 'inevitably lines must be drawn beyond which consent will be deemed ineffective'.⁴⁴ Whether a person can 'legally consent' to violence and if so, to what level of violence or harm, is a complex question and subject to conflicting opinions. The issue requires a balance between the state's right to prevent harm and the individual's right to freedom of choice.⁴⁵ Because of these conflicting principles it has been suggested that a compromise is required.⁴⁶ The dilemma is where to draw the line.

Background

The law in Western Australia in relation to consent to violence is quite different to the position at common law. At common law a person can only consent to common assault. Anything more serious (such as bodily harm, wounding or grievous bodily harm) is unlawful, irrespective of whether or not the 'victim' consented.⁴⁷ However, there are a number of exceptions at common law—such as ritual male circumcision, tattooing, ear-piercing and violent sports including boxing⁴⁸—which are considered justifiable in the public interest. It has been argued that the exceptions are based upon the 'public acceptability' of certain types of activities or behaviour.⁴⁹ The public interest or 'social utility' of some of these activities could be questioned.⁵⁰

The English case *R v Brown*⁵¹ dealt with sado-masochistic acts (which caused bodily harm and wounding) between consenting male adults performed in private for the purpose of sexual gratification. A majority of the House of Lords held that consent was irrelevant because sado-masochistic violence did not fit within any of the existing exceptions and, because of the inherent dangers involved, it could not be said that the behaviour was justifiable in the public interest.

The majority decision has been the subject of much criticism. It has been argued that the requirement that the relevant behaviour must have a 'social utility' is

42. See discussion in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

43. See discussion under 'Traditional Punishments', above pp 88–91.

44. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal' (1994) 68 *Australian Law Journal* 363.

45. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, 119.

46. Giles M, '*R v Brown*: Consensual Harm and the Public Interest' (1994) 57 *Modern Law Review* 101, 110.

47. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363.

48. *R v Brown* [1993] 2 All ER 75, 79 (Lord Templeman).

49. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, 123.

50. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a reappraisal' (1994) 68 *Australian Law Journal* 363, 376.

51. [1993] 2 All ER 75.

wrong. Instead, it is suggested that there should be a presumption that consensual behaviour is lawful unless there are public policy reasons for making it unlawful.⁵² Others have disapproved of the decision because it undermines 'individual autonomy' and infringes 'the right to privacy'.⁵³ The appellants in *R v Brown* appealed to the European Court of Human Rights, on the basis that their criminal convictions amounted to an unlawful and unjustifiable interference with their right to privacy under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. The court held that there was no violation of this convention and that the state is entitled to regulate through the criminal law 'activities which involve the infliction of physical harm' regardless of whether the activities take place in the context of sexual conduct or otherwise.⁵⁴ Further, it was held that:

The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other hand, to the personal autonomy of the individual.⁵⁵

In Australia the *Human Rights (Sexual Conduct) Act 1994* (Cth) provides that:

Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights.⁵⁶

It is not permissible for a state or territory to arbitrarily interfere with private sexual conduct between consenting adults. Therefore, if sexual conduct is interpreted to include the infliction of physical harm (such as may occur during sado-masochistic activities), then government cannot arbitrarily interfere.⁵⁷

In *R v Brown*, although the decision of the House of Lords was based on the assumption that all of the 'victims' were willing participants, Lord Templeman stated that in some cases alcohol and drugs were used to obtain consent and that it was not surprising that the 'victims' did not complain to the police given the nature of the activities. Lord Templeman observed that the consent of some of the participants was therefore 'dubious or worthless'.⁵⁸ One commentator, who noted that the genuineness of the consent in this case was questioned by at least two members of the House of Lords, emphasised that the key issue is what constitutes 'full, free and informed consent'.⁵⁹

The meaning of consent in this context is not easy to determine. Writers emphasise that the reason behind the violence, coupled with underlying social inequalities, may mean that 'consent' is not freely given. For example, Chris Kendall has argued that while 'some gay men may "choose" to be the objects of eroticized violence, degradation, beating and verbal abuse not everyone has or wants this "choice"'.⁶⁰ Kendall's main concern is that if there is no choice, consent is meaningless. Referring to *R v Brown*, he argues that many gay men are socialised to believe that they are worthy of abuse and ridicule, and that true consent cannot exist where abuse is normalised and the participants do not believe that there are any other life options available.

Similarly, Catharine MacKinnon maintains that consent assumes a level playing field where one may not exist.⁶¹ This has been recognised with the widespread criminalisation of female genital mutilation irrespective of whether the female child or her parents have given consent.⁶² And while 'consent' in this context might be 'given', many young women feel that they have little choice but to consent for fear of offending tradition and for fear of being ostracised from their community.

52. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General *Model Criminal Code* (May 1999) ch 5, 125; see also Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal' (1994) 68 *Australian Law Journal* 363.

53. Bronitt S, 'Protecting Sexual Privacy Under the Criminal Law: *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 19 *Criminal Law Journal* 222, 227.

54. *Laskey, Jaggard and Brown v The United Kingdom* [1997] ECHR 4 [44] & [51].

55. *Ibid* [45].

56. *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4. This statute was enacted as a consequence of a decision of the United Nations Human Rights Committee condemning Tasmanian laws which criminalised homosexual activity, between consenting adults in private.

57. However, it is arguable that the state may impose legal restrictions in order to protect individuals who are 'vulnerable because of youth, inexperience or emotional dependency': Bronitt S, 'Protecting Sexual Privacy under the Criminal Law: *Human Rights (Sexual Conduct) Act 1994* (Cth)' (1995) 19 *Criminal Law Journal* 222, 227–28.

58. [1993] 2 All ER 75, 82–83.

59. Giles M, '*R v Brown*: Consensual harm and the public interest' (1994) 57 *The Modern Law Review* 101, 107.

60. Kendall C, *Gay Male Pornography: An issue of sex discrimination* (Vancouver: UBC Press, 2003) 121.

61. MacKinnon C, *Toward a Feminist Theory of the State* (Harvard: Harvard University Press, 1989). See also Patemen C, *The Sexual Contract* (Cambridge: Polity, 1988); Jeffreys S, 'Consent and the Politics of Sexuality' (1993) 5 *Current Issues in Criminal Justice* 201.

62. Section 306 of the *Criminal Code* (WA) prohibits female genital mutilation and expressly states that consent is not a defence.

The Criminal Code (WA)

Assault and assault occasioning bodily harm

The definition of assault in s 222 of the *Criminal Code* (WA) provides that:

A person who strikes, touches, or moves, or otherwise applies force of any kind to the person of another, either directly or indirectly, without his consent, or with his consent if the consent is obtained by fraud, or who by any bodily act or gesture attempts or threatens to apply force of any kind to the person of another without his consent, under such circumstances that the person making the attempt or threat has actually or apparently a present ability to effect his purpose, is said to assault that other person, and the act is called an assault.

For any offence where assault is an element, the prosecution must prove beyond a reasonable doubt that the application of force was without the consent of the victim. The most relevant example for this discussion is the offence of assault occasioning bodily harm. In order to be convicted of this offence there must have been an assault (as defined above) and bodily harm.⁶³ Bodily harm is defined as any bodily injury which interferes with health or comfort.⁶⁴

Unlawful wounding

Section 301 of the *Criminal Code* (WA) provides that any person who unlawfully wounds another is guilty of a crime.⁶⁵ Because 'assault' is not an element of the offence of unlawful wounding the issue of consent is irrelevant. A wound is not defined in the *Criminal Code* (WA) but has been judicially interpreted as requiring the breaking of the skin and penetration below the epidermis (the outer layer of the skin).⁶⁶ Usually a wound will be caused by an instrument but it may also be caused by a fist – a split lip could be categorised as a wound.⁶⁷

Grievous bodily harm

Any person who unlawfully inflicts grievous bodily harm is guilty of an offence under s 297 of the *Criminal Code* (WA). Grievous bodily harm is defined in s 1 of the *Criminal Code* (WA) as:

any bodily injury of such a nature as to endanger, or be likely to endanger life, or to cause, or be likely to cause, permanent injury to health.

Similarly, because the term assault does not appear in s 297 consent is not an element of grievous bodily harm. In contrast, s 317A provides an offence for assaulting a person with intent to cause grievous bodily harm and therefore because assault is an element of this offence consent would appear to be applicable.

The relevance of consent

Although it has been suggested that a person cannot legally consent to an assault occasioning bodily harm, the Commission is of the view that under the *Criminal Code* consent is relevant to bodily harm but not to unlawful wounding.⁶⁸ Section 223 of the Code provides that:

The application of force by one person to the person of another may be unlawful, although it is done with the consent of that other person.

In *Lergesner v Carroll*⁶⁹ it was stated that the equivalent section under the Code in Queensland

reflects the policy and structure of the Criminal Code to divide offences against the person into two categories. Those which involve as an element an assault where the presence or absence of consent is determinative of the criminality of the application of force and those where consent is immaterial to the criminality of the conduct.⁷⁰

It is necessary for the prosecution to prove that the victim did not consent to the actual degree of force used.⁷¹ In other words, it is for the jury to decide whether the 'degree of violence used in the assault

63. *Criminal Code* (WA) s 317.

64. *Criminal Code* (WA) s 1.

65. The Commission notes that there are other offences that involve wounding but also include additional elements such as an intention to maim or disfigure or cause grievous bodily harm. The discussion which follows about the arbitrary distinction between unlawful wounding and assault occasioning bodily harm does not extend to these other offences.

66. *Halsbury's Laws of Australia* (Sydney: Butterworths, 1991) [130-1055].

67. *R v Shepard* [2003] NSWCCA 351.

68. In his background paper to this reference, Greg McIntyre argued that an act which resulted in a wounding or bodily harm would constitute an offence under the *Criminal Code* (WA) even if the victim had consented to the application of force. In support of his argument McIntyre relied on *R v Watson* (1986) 69 ALR 145. However, this case was distinguished in *Lergesner v Carroll* [1991] 1 Qd R 206 which held that lack of consent is an element of a charge of assault occasioning bodily harm. See McIntyre G, 'Aboriginal Customary Law: Can it be recognised', LRCWA, Project No 94, Background Paper No 9 (February 2005) 44.

69. [1991] 1 Qd R 206.

70. *Ibid.*

71. *Ibid* 217–18 (Cooper J).

exceeded that to which the consent had been given'.⁷² Each case must consider the relevant facts 'existing at the time the consent is expressly given or is to be inferred from the circumstances'.⁷³ For example, in violent sporting activities the consent of the participants to the normal rules and practices of the game is implied.⁷⁴ If violent conduct goes beyond that which is expected and impliedly consented to, then the perpetrator would be criminally responsible. In addition, an accused may rely on the defence of honest and reasonable mistake to argue that he or she honestly and reasonably believed that the 'victim' consented to the relevant harm.

The distinction between unlawful wounding and assault occasioning bodily harm

The offence of unlawful wounding is found in a section of the *Criminal Code* headed 'Offences Endangering Life or Health'. At first glance this suggests that the reason for the distinction between the two offences is that unlawful wounding is considered to be more serious. The maximum penalties for assault occasioning bodily harm and unlawful wounding are the same.⁷⁵ This indicates that Parliament, when setting the maximum penalties, considered the offences to be equally serious. The legislative penalties for both offences have been amended as recently as 2004.⁷⁶ Parliament has continued to treat the offences in exactly the same manner.

In each case, the facts must determine whether a specific example of unlawful wounding is more or less serious than an assault occasioning bodily harm. For example, a small cut would amount to a wound while a broken nose would be categorised as bodily harm. In a review of the *Criminal Code* in 1983 the anomaly between assault occasioning bodily harm and wounding was acknowledged.⁷⁷ It was argued that unlawful wounding covers a wide range of harm from serious to trivial and that it is an

unsatisfactory concept because it involves any full thickness penetration of the skin, whether that be by a pin prick or a shot gun blast.⁷⁸

It has also been noted that a wound may involve a minor injury that may not even amount to bodily harm because there may be no interference with health or comfort.⁷⁹ The Model Criminal Code Officers Standing Committee observed that:

There is no reason in logic for making the use of the word 'assault' the key criterion. Consent [is not] a defence to any charge of wounding, but wounding is established by the most trivial nicking of the skin, not amounting to bodily harm. Further, consent may provide a defence to a charge of assault occasioning bodily harm or assault with intent to cause grievous bodily harm. Under the Code, therefore, one could consent to a quite high level of violence.⁸⁰

The discrepancy is further evidenced in relation to ear-piercing and, possibly, tattooing. A person who pierces the ear or any other body part of another with consent would, under the present law, be guilty of unlawful wounding. Nonetheless, the *Health (Skin Penetration Procedure) Regulations 1998* (WA) establish controls over 'skin penetration procedures', which include procedures where the skin is cut, punctured or torn. The regulation of these activities demonstrates that there are some circumstances where Parliament considers that consent to wounding is acceptable.

Not only does the *Criminal Code* distinguish between unlawful wounding and assault occasioning bodily harm in terms of consent, but it also treats the offences differently in regard to the availability of the defence of provocation.⁸¹ A person may be excused for assault occasioning bodily harm if there was provocation for the assault, but provocation cannot constitute a defence to unlawful wounding. The Commission has strong reservations about the applicability of a complete defence of provocation to any non-fatal offence against the person⁸² and questions its relevance, even as a

72. Ibid 212 (Shepherdson J).

73. Ibid 218 (Cooper J). In *Horan v Ferguson* [1995] 2 Qd R 490, 495, McPherson JA stated that consent includes consent that is tacit or implied: 'Just as the absence of consent may be inferred from the circumstances, so too equally its presence may be inferred'.

74. *Abbott v The Queen* (Unreported, Supreme Court of Western Australia, CCA No 98/1995).

75. The maximum penalty for assault occasioning bodily harm and unlawful wounding is five years' imprisonment. If the victim of either of these offences is of or over the age of 60 years the maximum penalty is seven years' imprisonment: see *Criminal Code* (WA) ss 317, 310 respectively.

76. The maximum penalties for both offences committed in circumstances of aggravation and the maximum fine that can be imposed by a summary court were both increased. See for example, *Criminal Law Amendment Act 2001* (WA) and *Acts Amendment (Family and Domestic Violence) Act 2004* (WA).

77. Murray M, *The Criminal Code: A General Review* (1983) 202.

78. Ibid.

79. Kell D, 'Consent to Harmful Assaults Under the Queensland Criminal Code: Time for a Reappraisal' (1994) 68 *Australian Law Journal* 363, 372.

80. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, 123.

81. Sections 245 and 246 of the *Criminal Code* (WA) provide that the defence of provocation is only available (other than the defence of provocation for homicide in s 281) for an offence of which assault is an element.

82. The Commission notes that in the Murray Report it was observed that apart from Western Australia and Queensland, every other jurisdiction in Australia as well as New Zealand and the United Kingdom only allowed provocation as a partial defence to murder. It was recommended that

partial defence to murder.⁸³ In the present context, the Commission's opinion is that there is no justification for distinguishing between assault occasioning bodily harm and unlawful wounding in relation to the availability of the defence of provocation.

The difference between the offences may also have a bearing on which offence the police decide to charge. In some cases an injury may constitute both unlawful wounding and bodily harm. For example, a two centimetre deep cut would constitute a wound under the *Criminal Code* and would also constitute bodily harm. It would be naïve to believe that the relevance of consent and the availability of the defence of provocation would not, in some instances, impact upon the decision by police or prosecutors as to what offence a person is charged with.

Traditional Aboriginal Punishments

Traditional punishments may involve spearing, beatings, and sometimes both.⁸⁴ The Commission's consultations with Aboriginal people indicated that spearing is still practised by, and considered important in, many Aboriginal communities. In Warburton it was emphasised that spearing is not the only punishment available but it does have 'major symbolic and cultural significance'.⁸⁵ The fact that spearing still regularly occurs is evidenced by the number of cases which come before the courts where the issue of spearing is raised in mitigation of sentence.⁸⁶ However, it is not practised in all communities⁸⁷ and is not used in every possible situation.⁸⁸ Nevertheless, in Warburton it was emphasised that in some cases there is no alternative under customary law to spearing.⁸⁹

The circumstances in which spearings occur today differ from the past. Because of diabetes, high blood pressure

and other medical complaints it is recognised by Aboriginal people that some members of their community cannot be given the same level of punishment as others.⁹⁰

There were numerous comments to the Commission indicating that traditional punishment must be undertaken in the absence of alcohol: 'payback should not be confused with alcohol related violence'.⁹¹ In Kalgoorlie it was stressed that traditional punishment is not 'wanton destruction of property, nor is it done drunk, and it does not produce feuds. It is ritualised, measured, final and relentless, without limitation periods'.⁹² In the Pilbara it was stated that:

Traditional punishment in fact must be done while sober, and administered properly, using appropriate tools, and in the appropriate places.⁹³

As Aboriginal community members in Laverton explained, when determining whether violence was legitimately inflicted under customary law or was merely alcohol-related the following should be considered: whether the Elders were present; whether the offender has gone back to the community; and whether there 'was a clear mind'.⁹⁴ When undertaken in accordance with customary law, traditional punishment is a 'formal and regulated process'.⁹⁵

The nature of physical traditional punishments

Depending upon the type of traditional punishment an offence of common assault, assault occasioning bodily harm, unlawful wounding or grievous bodily harm may be committed. Some traditional punishments could potentially cause death. In the case of *The Police v Z*,⁹⁶ the court heard evidence from members of an Aboriginal community that spearing was no longer used because it may cripple the person. In *R v Rictor*⁹⁷ the

provocation should be abolished as a defence for non-fatal offences against the person. See Murray M, *The Criminal Code: A General Review* (1983) 153–54.

83. See discussion under 'Provocation', below pp 183–87.

84. See discussion under 'Traditional Punishments', above pp 88–91. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 17–18.

85. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

86. See discussion under 'Sentencing – Traditional Punishment as Mitigation', below pp 212–15.

87. LRCWA, *Thematic Summaries of Consultations – Meekatharra*, 28 August 2003, 29.

88. LRCWA, *Thematic Summaries of Consultations – Mowanjun*, 4 March 2004, 49.

89. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

90. LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 19; Pilbara, 6–11 April 2003, 8.

91. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 12; see also *Warburton*, 3–4 March 2003, 5.

92. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 22.

93. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 8.

94. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 14.

95. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5; *Broome*, 17–19 August 2003, 23. During consultation the Aboriginal Legal Service expressed the view that traditional punishment has to be 'properly administered, in the fleshy part of the thigh, under medical supervision and with an independent non-Aboriginal witness': LRCWA, *Thematic Summaries of Consultations – Aboriginal Legal Service*, 29 July 2003, 3.

96. (Unreported, Children's Court of Western Australia, No 3698/2001, O'Brien J, 24 April 2002).

97. (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002).

court was told that one of the purposes of spearing is to disable the person to the point that he or she cannot get off the ground or walk. During the Commission's consultations it was observed that traditional punishment may involve grievous bodily harm.⁹⁸

In the Western Australian case *R v Judson*⁹⁹ a number of accused were charged with assault occasioning bodily harm as a result of the victim being hit with sticks and a crowbar (in administering traditional punishment), and one accused was charged with unlawful wounding as a result of a spearing. All accused were acquitted. For the charges of assault occasioning bodily harm the defence relied upon consent and argued that, if the victim had not consented, the accused nevertheless held an honest and reasonable but mistaken belief that the 'victim' had consented. Because consent is not relevant to unlawful wounding, the only legal basis that the accused on that charge could have been acquitted, was that the jury was not satisfied beyond a reasonable doubt that he was the person who actually did the spearing.

The court accepted the medical evidence that the spearing had caused a wound (two centimetres deep) that had penetrated through all layers of the skin.¹⁰⁰ This case demonstrates that a spearing will not necessarily amount to grievous bodily harm.¹⁰¹ Each offence will depend upon where the spear penetrates, how deep the wound is and how many times the person was speared.

In practice, traditional punishment that consists of beating with sticks or other instruments would probably result in a charge of assault occasioning bodily harm. On the other hand, spearing would probably result in a charge of unlawful wounding. Even if the person punished in the first case was bruised and swollen all over, consent would remove criminal responsibility. In the second case, even if the wound was minor, the consent of the person punished would be irrelevant. Not only does the distinction between assault occasioning bodily harm and unlawful wounding appear arbitrary in the context of traditional punishment, it is also illogical when other forms of violence are considered.

In a submission to the NTLRC a compelling point was made:

The proposition that spearing is intrinsically dangerous is certainly tenable. Grievous harm and death are a possible consequence. It is questionable whether either is an intended outcome. Grievous harm or death may occur in boxing matches. In such contests the inflicting of grievous harm is an objective of the contest i.e. knocking unconscious or injuring the opponent to the point they are unable to continue – an outcome clearly intended. Payback is conducted to restore order as between families. Boxing contests involve two persons in a consensual assault seeking to inflict bodily and possibly grievous harm on each other for money.¹⁰²

A similar point was made by the ALRC:

It is difficult to avoid the conclusion that the common law has shown a measure of ethnocentricity in accepting the validity of consent to quite extreme forms of deliberate physical violence in some sports, while (probably) rejecting consent to the infliction of force in the course of indigenous traditional punishments.¹⁰³

While it appears to be uncommon for an Aboriginal person to be charged with a criminal offence for inflicting traditional punishment, this is not because physical traditional punishments do not occur. The scarcity of cases where an Aboriginal person has been charged may evidence an 'unofficial policy' by the police to acquiesce in such punishments where the person receiving the punishment consents.¹⁰⁴ Therefore, the decision to prosecute an Aboriginal person in these circumstances is at the discretion of the police: a situation which does not provide Aboriginal people with any certainty of their legal position. Another explanation may be that many spearings are inflicted in secret, which may in fact be more dangerous as there will be no police or medical presence. Further, incidents of traditional punishment may not come to the attention of police because the person who receives the punishment consents and makes no complaint about the matter.

Consent and traditional punishments

Perhaps the most difficult issue in this discussion is how to determine whether an Aboriginal person consents

98. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13–14.

99. (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J and Jury, 26 April 1996).

100. *Ibid* 6.

101. In *R v Minor* (1992) 2 NTLR 183, 195–96, Mildren J also expressed the view that spearing in the thigh would not necessarily amount to grievous bodily harm.

102. Superintendent Svikart, Submission to the NTLRC, 25 October 2002, 2.

103. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 363.

104. See discussion under 'Police and Aboriginal Customary Law', below pp 236–39.

to the infliction of physical traditional punishment. The *Criminal Code* does not contain a definition of consent for offences of violence.¹⁰⁵ For sexual offences the definition states that consent is not freely and voluntarily given if it is obtained by force, threats, intimidation, deceit or any fraudulent means. Nevertheless, this definition has been adopted by courts in consideration of consent to an assault. In *R v Judson*¹⁰⁶ the trial judge directed the jury that consent must be voluntary and not the result of fear, intimidation or threats.¹⁰⁷

It is questionable whether Aboriginal people living in communities that still practise traditional punishments such as spearing have a free and voluntarily choice to participate. One view is that because of the possibility that family members will be punished if the offender fails to accept traditional punishment there can be no true consent because the offender is 'forced' to agree to the punishment. The Commission is mindful of the numerous recounts by Aboriginal people that if a person who had offended Aboriginal customary law was not available for punishment then members of his or her family would be punished instead.¹⁰⁸ On the other hand, the ALRC concluded that traditional Aboriginal people follow their laws not just because of fear of punishment but because of a 'belief in their legitimacy' and there will be situations where Aboriginal people follow their customary law without any external pressure.¹⁰⁹

During the Commission's consultations in Warburton senior Aboriginal men stated that when properly done spearing was something to which offenders agreed by 'offering a leg'.¹¹⁰ It was observed that although traditional punishment is still a fact of life in many communities, 'sometimes families [will] say no to "tribal punishment way"'.¹¹¹ In Geraldton an Elder suggested that only those who choose to live under traditional law would be liable to punishment.¹¹²

However, in Broome it was stated that 'leaving traditional law is not in fact a choice. That is because such law is a part of who you are'.¹¹³ Similarly, in Geraldton it was said that '[u]ndergoing traditional punishment is not a matter of choice. If it is not undergone, the families affected by the offence will be after you or after your family'.¹¹⁴

The issue is further complicated by the concepts of Aboriginal mutual obligations and collective responsibilities and rights. It has been stated that:

Indigenous people have a greater sense of community in terms of both rights and responsibilities and thus place greater importance on collective rights over individual rights.¹¹⁵

In contrast, underlying the Western law concept of consent is individual freedom of choice. It is difficult to transpose this concept to Indigenous peoples where participation in physical punishment may be consented to because of mutual obligations under customary law. The consequences of not consenting to punishment may extend to being ostracised from community and culture.

It is also important to recognise that for non-Aboriginal people it is difficult to accept or understand that a person may willingly undergo violent punishment. In discussing the sado-masochistic activities in *R v Brown*, it was observed that because an outsider feels repulsion he or she may question how anyone could possibly consent to that level of harm.¹¹⁶ It was said that:

[Because] many could not and most certainly do not consent does not mean that no one in fact can and does.¹¹⁷

The age at which a person can legally consent to violence is also a complicated issue. A child under the age of 13 years cannot consent to offences of a sexual nature,¹¹⁸ but there is nothing in the *Criminal Code* to

105. In the 1983 Review of the *Criminal Code* (WA) it was recommended that consent should be defined for all relevant sections to mean 'a consent freely and voluntarily given and, without otherwise affecting or limiting the meaning of the word, a consent is not freely and voluntarily given if it is obtained by force, threats or intimidation, or by any deception or fraudulent means': see Murray M, *The Criminal Code: A General Review* (1983) 528.

106. (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J and Jury, 26 April 1996).

107. Ibid.

108. See LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 41–42; *Pilbara*, 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 11; *Wiluna*, 27 August 2003, 22.

109. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 308.

110. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

111. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 9.

112. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13–14.

113. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.

114. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 14.

115. Gerber P, 'Black Rights/White Curriculum: Human rights education for Indigenous peoples' [2004] *Deakin Law Review* 3, 85.

116. Archard D, *Sexual Consent* (Oxford: Westview Press, 1998) 112.

117. Ibid.

118. *Criminal Code* (WA) s 319(2).

prevent a child consenting to an application of force. In *R v Judson*¹¹⁹ the victim was 14 years old and all the accused were acquitted of assault occasioning bodily harm, because the prosecution could not prove beyond a reasonable doubt that the 'victim' had not consented. There are situations where consent to the application of force is appropriate for children, such as in some sports. However, for other situations, such as traditional punishment, it is arguable that children should be protected because they are not necessarily in an equal position to be able to refuse.

Due to the diversity of Aboriginal people in Western Australia and the difficulty of determining the exact nature of customary law in any particular community, the Commission believes that in some cases Aboriginal people may consent to being speared because they fear that someone close will be punished instead. In other cases, they may agree to undergo punishment because they do not wish to be rejected by their community or because they truly wish to undergo the traditional punishment process.

Traditional Aboriginal Punishments and Fundamental Human Rights

It has been suggested that spearing or other forms of physical traditional punishment may contravene the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, and the *International Covenant of Civil and Political Rights*, both of which prohibit torture and other acts of cruel, inhuman or degrading treatment or punishment. Neither of these international conventions defines cruel, inhuman or degrading treatment or punishment. The Human Rights Committee has commented that it is unnecessary to list prohibited acts and the distinctions between 'cruel', 'unusual' and 'degrading' depends upon the 'nature, purpose and severity of the treatment applied'.¹²⁰ The stated aim is to 'protect both the dignity and the physical and mental integrity of the individual'.¹²¹

In the context of its inquiry into Aboriginal customary law in the Northern Territory, the NTLRC observed that:

[C]ruel, inhuman or degrading treatment or punishment is determined solely by cultural perspective. With respect to people bound by traditional law, the punishment is not regarded as such.¹²²

Further, it was stated that 'an action alleged to breach the prohibition of torture and cruel, inhuman and degrading treatment must be intended to inflict a degree of cruelty and humiliation on the victim'.¹²³ It has also been noted that the question whether traditional punishments breach these standards will depend upon the individual circumstances.¹²⁴ The Aboriginal and Torres Strait Islander Social Justice Commissioner argued in a submission to the NTLRC that 'rather than imposing a uniform ban or refuse to recognise certain practices, the Commission notes that it is preferable for judicial organs to be required to balance Aboriginal Customary law issues with human rights standards'.¹²⁵

Sam Garkawe has observed that the words 'cruel' and 'degrading' are culturally relative and that from an Aboriginal perspective, an 'unusual' punishment:

may be placing someone in jail for long periods of time, away from their family and community. Thus, to some Aboriginal people, a one-off spearing would be less cruel or degrading than a lengthy jail term.¹²⁶

Similarly, during the Commission's consultations in Wuggubun it was argued that international standards must be viewed from the point of view of Aboriginal people:

The matter of Australia's international obligations in relation to physical punishment needs to be understood from our point of view. Ours goes back much further. These international law norms strike many of us as disrespectful and ridiculous. For us, prison is cruel and inhumane.¹²⁷

Davis and McGlade contend that, like non-Indigenous Australians, Indigenous people have differing views on

119. (Unreported, District Court of Western Australia, No POR 26/1995, O'Sullivan J and Jury, 26 April 1996).

120. General Comment No 20, which replaces General Comment No 7 concerning the prohibition of torture and cruel treatment or punishment: *International Covenant of Civil and Political Rights*, Article 7, 44th Session, 10 March 1992.

121. Ibid.

122. NTLRC, *International Law, Human Rights and Aboriginal Customary Law*, Background Paper No 4 (2003) 34.

123. Ibid 23.

124. Joseph S, Schultz J & Castan M (eds), *The International Covenant on Civil and Political Rights: Cases, commentary and materials* (Oxford: Oxford University Press, 2000) 140–44, as quoted in NTLRC, *ibid*.

125. Ibid.

126. Garkawe S, 'The Impact of the Doctrine of Cultural Relativism on the Australian Legal System' (1995) 2(1) *Murdoch University Electronic Journal of Law* 11. This was also observed by the ALRC: see *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [184].

127. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.

these issues.¹²⁸ They argue that when considering whether a particular cultural practice breaches an international law instrument it is necessary to understand the cultural context in which the practice was committed. They also advocate a case-by-case approach and argue that a 'whole-scale prohibition' would breach other international standards that require the protection of culture and the obligation to consult.¹²⁹

Options for Reform

The ALRC did not advocate reform of the law in this area. It concluded that considerations in relation to consent and traditional punishment could appropriately be left to discretionary decisions in sentencing, bail and prosecution policy.¹³⁰

The NTLRC recognised that spearing may amount to grievous bodily harm and if so would be unlawful under their Criminal Code. It recommended that the Northern Territory government establish an inquiry to consider the extent that payback is still practised and to develop policy options to respond to the issue.¹³¹

In considering the need for reforming the law of consent as it applies to violent offences, the Commission notes the observation that:

Laws should reflect social need, not moral repugnance. Unless there are pressing reasons to do so, it is futile to try and stop activities which are bound to continue and upon which the community is divided ... Where the moral issue is one upon which there is room for seriously divergent opinions, the legislature should interfere only to the extent necessary to protect the community, or any individuals with special needs. Generally those who take part voluntarily in activities some consider morally repugnant should not be the concern of the legislature unless they are so young and defenceless that their involvement is not truly voluntary.¹³²

The Commission does not support any blanket legalisation of physical traditional punishments. To do so regardless of the individual circumstances (such as whether the person being punished consents, the age of the person being punished and the nature of the

punishment) would breach international human rights standards. It would also be contrary to the state's obligation to protect individuals from harm. Any reform must, at the very least, ensure that each case can be determined depending upon the individual circumstances: a court would have to decide based upon the evidence before it, whether the person punished did in fact consent.

Due to the difficult and complex issues involved some may consider that it is preferable to do nothing. Any accommodation of physical punishment may be seen to encourage violence. But to ignore this issue fails to address the inconsistencies between the offences of assault occasioning bodily harm and unlawful wounding. These inconsistencies not only affect Aboriginal people but all Western Australians.

Legislative change

There are three possible options for legislative change. The first is to amend the *Criminal Code* to introduce an element of consent into the offence of unlawful wounding. This option would remove the anomaly that currently exists in relation to the relevance of consent to unlawful wounding and assault occasioning bodily harm.

The second option is to repeal the offence of unlawful wounding. As discussed earlier, it has been suggested that unlawful wounding is conceptually difficult. The 1983 Murray report recommended that the offence of unlawful wounding should be abolished.¹³³ Murray was of the view that it was preferable to rely upon the distinction between bodily harm and grievous bodily harm.¹³⁴

The third approach would be to reconsider the current classification of harms resulting from violence. The manner in which the draft Model Criminal Code distinguishes between harm and serious harm is instructive. Harm includes both physical and mental harm. Serious harm is defined as any harm that 'endangers, or is likely to endanger a person's life' or that 'is likely to be significant and longstanding'.¹³⁵ A person will not be guilty of the offence of intentionally

128. Davis M & McGlade H, 'International Human Rights Law and the Recognition of Aboriginal Customary Law' LRCWA, Project 94, Background Paper No 10 (March 2005) 27.

129. Ibid 63.

130. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [503].

131. Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 27.

132. Queensland Commission of Inquiry, *Report into Possible Illegal Activities and Associated Police Misconduct*, (1989), as quoted in Morgan N, 'Legislation Comment: Law Reform (Decriminalisation of Sodomy) Act 1989 (WA)' (1990) 14 *Criminal Law Journal* 180, 181.

133. Murray M, *The Criminal Code: A General Review* (1983) 202.

134. Ibid.

135. Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code* (May 1999) ch 5, [5.1.2].

causing harm if the victim consents. However, for conduct that causes serious harm or conduct that gives rise to a danger of death or serious harm the person will not be criminally responsible if it is conducted for the purpose of benefiting the other person or in pursuance of a socially acceptable function or activity.¹³⁶

The potential benefits of reforming the law in this area include:

- Properly sanctioned and consensual spearing that is not likely to cause permanent injury to health or death could take place without the person who inflicted the punishment being liable to a criminal sanction.
- It may provide more guidance to assist police officers in their approach to traditional punishment. As discussed separately, police officers are faced with a dilemma of whether to facilitate traditional punishment because it potentially breaches the criminal law. If police officers are satisfied that the person to be punished genuinely consents then they can, with the agreement of the community, be present during the punishment.
- It may provide more flexibility for courts when dealing with bail applications and in sentencing decisions. Evidence might be led to satisfy the court that an accused genuinely consents to a spearing and that the proposed punishment falls within the level of harm that can legally be consented to. A court would not then be precluded from releasing a person from custody for the purpose of traditional punishment.
- It would remove the unnecessary distinction between assault occasioning bodily harm and unlawful wounding. This has other implications, for example for people involved in ear or body piercing or tattooing.

The Commission has identified what it considers to be the relevant issues in this area. These are not easily resolved. In the absence of specific submissions about the possible options for reform from Aboriginal people and from the wider community, the Commission has been unable to reach a conclusion. Therefore, the Commission strongly encourages submissions in relation to this issue.

Invitation to Submit 5

The Commission invites submissions as to whether the *Criminal Code* (WA) should be amended to remove the distinction between assault occasioning bodily harm and unlawful wounding and, if so, whether:

- the *Criminal Code* (WA) should provide that consent is an element of an offence of unlawful wounding; or
- the offence of unlawful wounding should be removed; or
- the various categories of violence should be redefined as harm or serious harm and to provide that a person can consent to harm but not to serious harm unless in pursuance of a socially acceptable function or activity.

Ignorance of the Law

Basis of the Rule

The law in Western Australia reflects the common law position that ignorance of the law does not generally provide an excuse for criminal behaviour.¹³⁷ The criminal law incorporates concepts such as blameworthiness and fault. Therefore, the rule in respect of ignorance of the law has the potential to cause injustice when an accused person has no knowledge that what he or she did was wrong. As Brennan J observed in *Walden v Hensler*,¹³⁸ this rule does not generally operate unfairly in relation to laws that prohibit wrong or immoral conduct. However, it may do so in circumstances where the law prohibits conduct that an ordinary person, without any special knowledge of the law, may engage in believing that they are entitled to do so. One justification for the rule that ignorance of the law is no excuse for criminal behaviour is to educate the community about conduct that is prohibited by the criminal law. If ignorance of the law excused criminal conduct there would be little incentive for members of the community to ensure that they are aware of their responsibilities under Australian law.¹³⁹ It has also been suggested that another justification for the rule is expediency: if ignorance of the law could be relied upon to excuse a person from criminal responsibility

136. Ibid [5.1.17].

137. *Criminal Code* (WA) s 22.

138. (1987) 75 ALR 173.

139. Amirthalingam K, 'Mistake of Law: A Criminal offence or a reasonable defence?' (1994) 18 *Criminal Law Journal* 271, 272.

then there would be no limit to the cases where such a defence would be raised.¹⁴⁰

Although Western Australia is a code state, not all criminal offences are contained in the *Criminal Code*, or even in legislation that deals with a particular subject matter.¹⁴¹ In addition, regulatory offences are often contained in complex legislation and may only be known to those people who are directly involved in the activities or industry that is subject to the regulation. The fact that ignorance of the law does not provide an excuse has the potential to operate unjustly in circumstances where a person honestly believed that their conduct was lawful and the nature of the legal prohibition was not one that the person should be expected, in all the circumstances, to know.¹⁴²

The Potential Injustice for Aboriginal People

The difficulty of knowing all matters that are proscribed by the criminal law is more pronounced for people who have cultural or language barriers.¹⁴³ People who do not fully understand English would be unlikely to understand any written publication of the law. Some people may come from a cultural background where certain conduct (that is prohibited in Australia) is considered acceptable or even required in their own community or country of origin.¹⁴⁴ For those Aboriginal people whose lives are primarily controlled by Aboriginal customary law the potential for injustice equally exists. Aboriginal people may engage in conduct that is acceptable or required by Aboriginal customary law without knowing that this conduct is unlawful under Australian law. For example, Aboriginal people may take rare flora for the purposes of customary harvesting without realising that they may be committing an offence.¹⁴⁵ For traditional Aboriginal people, the need to consider and understand Australian written law may

not be readily apparent given that Aboriginal customary law is based on oral tradition. The Commission's consultations indicated that many Aboriginal Western Australians were concerned about their lack of knowledge of Australian law and sought improved education about Australian law and the legal system.¹⁴⁶

Options for Reform

A defence based on ignorance of the law

One option, suggested by Philip Vincent, to overcome the potential injustice for Aboriginal people would be to provide that ignorance of the law is an excuse for offences committed by Aboriginal people.¹⁴⁷ In other words, if an Aboriginal person was unaware of the relevant Australian law he or she would not be criminally responsible for an offence if there was an honest belief that the conduct was authorised by Aboriginal customary law. To allow criminal behaviour to be excused because of an honest (but not necessarily correct) belief that the behaviour was permitted under Aboriginal customary law may contribute to an increase in false claims being made that certain behaviour is legitimate under Aboriginal customary law.¹⁴⁸ For example, false claims have been made in the context of family violence: despite the belief of some Aboriginal men to the contrary, there is no legitimate basis for family violence under Aboriginal customary law.¹⁴⁹

A strong argument against a separate defence of ignorance of the law for Aboriginal people is that it would not provide adequate protection for other Aboriginal people. For example, recently in the Northern Territory, a traditional Aboriginal man was sentenced for having sexual relations with a child. The sentencing judge took into account as mitigation the fact that the defendant did not know that he was committing an offence and that he believed that his actions were

140. *Iannella v French* (1968) 119 CLR 84 (Taylor J). It has also been stated that the common law rule that ignorance of the law is not a defence is 'one of convenience not one of justice nor one of principle'. See Bronitt S & Amirthalangam K, 'Cultural Blindness: Criminal law in multicultural Australia' (1996) *Alternative Law Journal*: see <<http://www.law.anu.edu.au/criminet/tart2.html>> 5.

141. For example, *Misuse of Drugs Act 1981* (WA) and *Road Traffic Act 1974* (WA).

142. The Commission discusses the recent case *Ostrowski v Palmer* (2004) 206 ALR 422; [2004] HCA 30, in Part VIII below pp 375–76. The High Court held that although a fisherman had been given erroneous advice by a fisheries office about the areas where fishing was prohibited did not provide a defence because the fisherman had been acting in ignorance of the law.

143. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

144. *Ibid* 169.

145. This issue is explored in detail under 'Honest Claim of Right', below pp 175–78. It is also discussed in detail in the broader context of Aboriginal customary harvesting rights in Part VIII 'Customary Hunting, Fishing and Gathering Rights', below pp 365–82.

146. LRCWA, *Thematic Summaries of Consultations – Cosmo Newbery*, 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 25; *Pilbara*, 6–11 April 2003, 11; *Wiluna*, 27 August 2003, 22; *Albany*, 18 November 2003, 14; *Wuggubun* 9–10 September 2003, 35.

147. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 15–16. Vincent suggestion was that offences of murder, grievous bodily harm and sexual assault should be excluded from the operation of this proposed defence.

148. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', below pp 221–24.

149. See Part VII 'Family Violence, Child Abuse and Customary Law', below pp 357–62.

justified under customary law.¹⁵⁰ If ignorance of the law was an excuse this defendant would probably have been acquitted. For Aboriginal people to be protected by Australian law it is necessary that they also be bound by it.

In order to overcome the potential difficulty in ascertaining the law for some members of the community, the ALRC considered the option of a limited defence where ignorance of the law was the result of 'inadequate provision of information in an accessible form'.¹⁵¹ In some jurisdictions it is a defence that the relevant statutory provision has not been adequately published.¹⁵² In Western Australia statutory provisions and subordinate legislation are required to be published in the government gazette.¹⁵³ Publication or notification in a government gazette may not be an effective way of ensuring public knowledge of the law.¹⁵⁴ The gazette can be accessed via the internet or by subscription or individual purchase. Without appropriate resources or some knowledge of the existence of a particular law, publication in the gazette is unlikely to adequately inform Aboriginal people of relevant changes to Australian law.

The ALRC did not support the establishment of a defence based on the inaccessibility of information because it considered that the responsibility of all members of the community to know what is permitted under Australian law should remain. Bearing in mind that ignorance of the law is a matter that can be taken into account in mitigation of sentence; the ALRC considered that the appropriate way to alleviate any injustice was to introduce strategies to improve communication of the law.¹⁵⁵

Justifiable ignorance of the law to be taken into account in sentencing

Although the Commission is of the opinion that ignorance of the law cannot be asserted as defence, it is a factor that should be taken into account during sentencing. In *Walden v Hensler*¹⁵⁶ an Aboriginal man was convicted of an offence that involved taking protected fauna in circumstances where he believed he was entitled under both Aboriginal customary law and the law in Queensland. The majority of the High Court accepted the appellant's 'moral innocence' and took this into account by discharging him without conviction and without imposing any penalty.¹⁵⁷ In 1992 the ALRC recommended that ignorance of the law should be included, in the *Crimes Act 1914* (Cth), as a mitigating factor for the purposes of sentencing.¹⁵⁸ The *Sentencing Act 1995* (WA) provides that a court is to take into account in mitigation of sentence anything that decreases the offender's culpability or the extent to which he or she should be punished.¹⁵⁹ Although ignorance of the law is not expressly included in the *Sentencing Act 1995* (WA) as a mitigating factor, it clearly falls within the definition and can legitimately be taken into account by a sentencing court.

Improve communication about the law

In order to overcome any injustice caused by the rule that ignorance of law is not an excuse for an offence, the ALRC recommended that government agencies improve the communication of legislative provisions that restrict behaviour to those groups of people who would most likely be affected by them.¹⁶⁰ The Commission

150. *R v CJ* (Unreported, Supreme Court of Northern Territory, SCC 20418849, Martin CJ, 11 August 2005) 6.

151. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

152. For example, *Criminal Code* (Qld) s22(3) provides a defence where the person was not aware of the relevant statutory instrument and the statutory instrument had not been published or otherwise made reasonably available or known to the public or to those people who are most likely to be affected by it. Note that the effect of s 22(4) is that statutes are required to be published in the Gazette and subordinate legislation (eg, regulations, orders and notices) are required to be either published in full or notice given of their existence in the Gazette. See also *Criminal Code 1983* (NT) s 30. A similar defence is contained in the model Criminal Code in relation to subordinate legislation only: see Criminal Law Officers Committee of the Standing Committee of Attorney Generals, *Model Criminal Code: Chapters 1 and 3, General Principles of Criminal Responsibility* (December 1992) s 9.4.

153. *Interpretation Act 1984* (WA) s 41.

154. Criminal Law Officers Committee of the Standing Committee of Attorney Generals, *Model Criminal Code: Chapter 1 and 3, General Principles of Criminal Responsibility* (December 1992) 57.

155. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

156. (1987) 75 ALR 173.

157. *Ibid* 175 (Brennan J; Deane & Dawson JJ concurring). The magistrate had originally imposed a fine and ordered the defendant to pay costs, which together amounted to \$919.50. Brennan J specifically noted that the appellant was not engaged in an activity or business in which he would be expected to make specific enquires.

158. The ALRC recommended that the fact that the accused did not know that he or she had committed an offence and he or she could not reasonably be expected to know the relevant criminal law should be a mitigating factor: see ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 180. Although this recommendation has not been acted upon by the Commonwealth Government, s 16A of the *Crimes Act 1914* (Cth) does contain a provision that when sentencing a court is to take into account the cultural background of the offender. It could be argued that if an offender was unaware that he or she had committed an offence due to cultural or language barriers then this could be legitimately considered in sentencing under this provision.

159. *Sentencing Act 1995* (WA) ss 6 & 8.

160. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 179.

agrees and considers that the educative role of the criminal law would be undermined if people could escape criminal liability because they were not able to easily find out about the law. The Northern Territory case referred to above provides a useful example. As stated, if ignorance of the law was a defence then that particular accused may well have been excused because he did not know that it was an offence to have sexual relations with a 14 year old child.¹⁶¹ If this was the result the criminal law would fail to educate other Aboriginal men (who may consider that such behaviour is acceptable under customary law) that they may be committing an offence under Australian law.

In this Discussion Paper the Commission has considered specific areas where educative measures can be taken to assist Aboriginal people in understanding their rights and responsibilities under Australian law. For example, the Commission has made a proposal in relation to more effective communication of Australian laws that regulate hunting and foraging (of flora and fauna) and the law in relation to the discipline of children.¹⁶² For some Aboriginal people (as well as the members of the wider community) the publication of changes to the law in the Government Gazette may not be effective. Therefore, the Commission suggests that there should be more effective and culturally appropriate information about criminal laws that may significantly affect Aboriginal people.

Proposal 20

That relevant Western Australian government departments provide culturally appropriate information about changes to the criminal law that may significantly affect Aboriginal people. For the purposes of improving the communication of specific laws to Aboriginal people, government departments should consider engaging Aboriginal organisations and groups to assist with the design and delivery of any legal education program.

Honest Claim of Right and Native Title Defence

Honest Claim of Right

The requirements of the defence

There is a limitation to the general rule that ignorance of the law does not provide an excuse for a criminal offence. Section 22 of the *Criminal Code* (WA) provides that:

[A] person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud.¹⁶³

In order to rely on the defence of honest claim of right it is necessary that:

- the offence is one relating to property;
- the accused had an honest belief that he or she was entitled to do the act or make the omission; and
- the belief must be of such a nature that if true the accused would have been entitled to do the act or make the omission with respect to any property and, therefore, would be exonerated from criminal responsibility.

The offence must relate to property

In order to rely on the defence of honest claim of right the offence must be one that relates to property.¹⁶⁴ Originally, the defence had been judicially interpreted as applying only to offences under the heading 'Offences Relating to Property and Contracts' in Part VI of the *Criminal Code* (WA).¹⁶⁵ However, this interpretation was challenged before the High Court in *Walden v Hensler*¹⁶⁶ which considered the equivalent defence in s 22 of the Queensland *Criminal Code*. In *Walden* the appellant, an Aboriginal man, had taken turkeys from Crown land, honestly believing that he was entitled to do so pursuant to the customs of Aboriginal people and believing that this right had not

161. The accused in this case believed that he was entitled to do what he did because it was acceptable under the Aboriginal customary law of his community. It was also accepted by the court that he was not aware that it was an offence under Australian law. See *R v CJ* (Unreported, Supreme Court of Northern Territory, SCC 20418849, Martin CJ, 11 August 2005) 6.

162. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting', below pp 375–76 and discussion under 'Discipline of Children', below pp 187–89.

163. *Criminal Code* (WA) s 22.

164. In *DPP Reference No 1 of 1999* [2000] NTCA 6 the Court of Appeal of Northern Territory Supreme Court held that the similar defence under the *Criminal Code* (NT) could not apply to an offence of assault as it was not an offence relating to property.

165. See *Pearce v Paskov* [1968] WAR 66 (Virtue J).

166. (1987) 75 ALR 173.

been removed by Australian law. He was charged with an offence of keeping protected fauna in contravention of s 54 of the *Fauna Conservation Act 1974–1979* (Qld). Although the defence ultimately failed, three judges of the High Court held that the defence of honest claim of right has a broad application and can apply to offences other than those described as offences relating to property and contracts in the *Criminal Code*.¹⁶⁷

This finding was confirmed in *Molina v Zaknich*¹⁶⁸ where the Full Court of the Supreme Court of Western Australia agreed that offences relating to property for the purposes of the defence of honest claim of right are not restricted to offences classified as property offences in Part VI of the *Criminal Code*.¹⁶⁹ Therefore, the defence of honest claim of right can be available, if all of the other requirements are met, for any offence which relates to property.

There must be an honest belief

The accused must have had an *honest* belief or claim that they were entitled to do the act or make the omission giving rise to the offence. In other words, if the accused knew that their actions constituted a breach of Australian law then the defence would fail because the belief could not be said to be honest. In *Margarula v Rose*¹⁷⁰ the accused was charged with trespassing. She believed that she was entitled under Aboriginal customary law to protect specific land but the defence of honest claim of right failed because the accused knew that she would be arrested for her conduct.¹⁷¹

The belief must be of such a nature that if true it would exonerate the accused

Ignorance of the criminal law is not an excuse for a criminal charge.¹⁷² In order to rely on the defence of honest claim of right the belief must be in relation to a

legal right under civil law and must be of such a nature that if the belief were true, it would exonerate the accused from any criminal charge. For example, a person taking another person's property honestly believing it to be their own would be acting under an honest claim of right.¹⁷³ The belief is in relation to the person's entitlement under civil law (in this example that they in fact owned the item) which if true would exonerate the person from a charge of stealing. In *Basso-Brusa v City of Wanneroo* Pullin J stated that:

Plainly, the fact that a person can honestly say that he thought he was entitled to do the relevant act because he was unaware that it was proscribed by the criminal law, does not provide him with a defence of honest claim of right under s 22 of the *Criminal Code*.¹⁷⁴

In *Walden v Hensler* Deane and Dawson JJ held that the appellant's belief that he was entitled to take the turkeys amounted to no more than ignorance of the criminal law – he was not aware that his actions were prohibited by the legislation. Their Honours were of the view that the offence created by s 54 of the *Fauna Conservation Act 1974–1979* (Qld) prohibited the taking or keeping of fauna regardless of any ownership or other rights to the property. Therefore, even if Australian law recognised his Aboriginal customary law right to take the turkeys, the appellant would still be guilty of the offence.¹⁷⁵

Aboriginal customary law and the defence of honest claim of right

Because the defence of honest claim of right is based upon a mistake, a claim of right does not have to be one that is recognised by Australian law. A belief by an accused person that he or she is entitled to do something in relation to property pursuant to Aboriginal customary law is valid and sufficient but only if there is also a belief that this right is recognised by Australian

167. Ibid 187 (Deane J), 201–02 (Toohey J), 208 (Gaudron J). The majority of the High Court (Brennan, Deane and Dawson JJ) held, for different reasons that the defence of honest claim of right did not apply. Brennan J held that the defence of honest claim of right only applies to offences in which the 'causing of another to part with property or the infringing of another's rights over or in respect of property is an element' (at 183). Deane and Dawson JJ based their reasons on the fact that there must be a belief of a right which if true would have exonerated the accused.

168. [2001] WASCA 337.

169. Ibid [97] (McKechnie J; Malcolm CJ and Templeman J concurring). In this case the court held that s 22 was applicable to a charge of being on premises without lawful authority pursuant to s 82B(1) of the *Police Act 1892* (WA). Also in *Basso-Brusa v City of Wanneroo* [2003] WASCA 103, [16] it was held that s 22 may apply to an offence under the *Town Planning and Development Act 1928* (WA).

170. [1999] NTSC 22.

171. For a detailed discussion of this case, see Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 67. The decision was confirmed on appeal to Northern Territory Court of Appeal in *Margarula v Rose* [2000] NTCA 12, [39].

172. Levy R, 'Native Title and the Criminal Law: the Defence of Galarwuy Yunupingu' (1998) 4(13) *Indigenous Law Bulletin* 10. The general proposition that mere ignorance of the criminal law is not sufficient to found a honest claim of right under s 22 was referred to in *Walden v Hensler* (1987) 75 ALR 173, 187–88 (Deane J), 196 (Dawson J), 204 (Toohey J); 206 (Gaudron J).

173. *Basso-Brusa v City of Wanneroo* [2003] WASCA 103 [18] (per Pullin J).

174. Ibid [20].

175. *Walden v Hensler* (1987) 75 ALR 173, 187–88 (Deane J), 196 (Dawson J).

law.¹⁷⁶ The defence was successfully relied upon by Aboriginal defendants in *R v Craigie and Pattern*.¹⁷⁷ The defendants were charged with breaking and entering into an art gallery and stealing Aboriginal paintings. They were acquitted because the court found that they held an honest belief that the law of New South Wales recognised their right under Aboriginal customary law to claim possession of the paintings.¹⁷⁸

In *R v Waine*,¹⁷⁹ an Aboriginal woman was successful in an appeal against her conviction of six charges of wilful damage. The appellant argued that the trial judge had been wrong in refusing to allow the defence of honest claim of right to be left to the jury. It was alleged that she had spray-painted the words 'Aboriginal University of Australia' on buildings that were owned by the Queensland Department of Environment. In her defence, the appellant relied on her honest belief that she had been given permission by the traditional Aboriginal land owner to paint the buildings. The appellant believed that this person's native title rights had been recognised by Australian law. The trial judge had refused to allow the jury to consider the defence because the defendant was not claiming a right that was personal to her. It was held that the defence of honest claim of right was available to the appellant because the defence is not limited to a claim of ownership or possession: it can be an honest belief of an entitlement to do an act in respect of property. Thus the appellant's belief that she had the consent of the owner was considered sufficient to give rise to an honest claim.¹⁸⁰

Availability of the defence of honest claim of right to offences relating to customary harvesting

For the purpose of considering whether the defence of honest claim of right could be available for an Aboriginal person exercising customary harvesting rights it is useful to classify offences in this area into two categories. The first category is offences which prohibit an activity without any exemption for Aboriginal people.

For example, the offence that was relevant in *Walden v Hensler*, under s 54 of the *Fauna Conservation Act 1974–1979* (Qld), created an offence of taking protected fauna without a licence. There was no exemption for Aboriginal people. The accused Aboriginal person in that case believed that he was entitled to take the fauna under Aboriginal customary law and that the law of Queensland recognised that right. Two of the judges held that honest claim of right did not apply because even if a customary law right to take fauna had been recognised by the law of Queensland the accused would still be guilty of the offence. This was because all people were prohibited from taking protected fauna without a licence regardless of whether they owned the fauna or had some other entitlement to it.¹⁸¹

The second category relates to offences that are contained in legislation which also includes an exemption for Aboriginal people. For example, under s 16 of the *Wildlife Conservation Act 1950* (WA) it is an offence to take protected fauna (from any land) without a licence. Aboriginal people are exempted from the operation of this provision because s 23 of the *Wildlife Conservation Act* permits Aboriginal people to engage in hunting and foraging (of flora and fauna) on Crown land or private land (other than a nature reserve or wildlife sanctuary) for subsistence purposes. If the land is private, the consent of the owner or occupier is required. As discussed in more detail in Part VIII below, problems arise because this exemption is subject to restriction at any time by the Governor. Any such restriction is declared in the Government Gazette.¹⁸² The availability of the defence of honest claim of right is significant given the likelihood that some Aboriginal people may be aware that they are exempted from the prohibition of taking protected fauna without a licence, but may not be aware of a subsequent restriction being imposed.

The possibility of relying on an honest claim of right in this second category can be illustrated by the following hypothetical example. Assume that, for conservation

176. Ibid 179 (Brennan J); 202 (Toohey J); 208 (Gaudron J).

177. (Unreported, District Court of New South Wales, 1980).

178. The right under Aboriginal customary law entitled them to take possession of the paintings in order to prevent them from being removed from the Aboriginal community to which they belonged: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [435]. The Commission notes that the defence was relied on unsuccessfully for an offence of trespass in *Margarula v Rose* [1999] NTSC 22. The defence failed because it was held that the defendant did not have an honest belief that her customary law right to protect the area of land that she had entered was recognised by the law of Northern Territory. The defendant knew that she would be arrested for placing herself on the top of a container at the Jabiluka mine site and therefore her belief was not genuine.

179. [2005] QCA 312.

180. Ibid [25] (Keane JA; McMurdo P and Wilson J concurring). Although the appeal was successful a new trial was ordered.

181. *Walden v Hensler* (1987) 75 ALR 173, 187–88 (Deane J); 196 (Dawson J). The Commission notes that the two dissenting judges Toohey and Gaudron JJ held that the defence of honest claim of right was available therefore there is not a majority view in relation to the availability of the defence of honest claim of right to these types of offences once it accepted that the offence is an offence relating to property.

182. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights', below pp 375–76.

purposes, the Governor has restricted the right of Aboriginal people to hunt Western Grey Kangaroo under s 23 of the *Wildlife Conservation Act 1950* (WA). Prior to this restriction, an Aboriginal person who had taken Western Grey Kangaroo from Crown land for subsistence purposes would have been exempted from the offence of taking kangaroo without a licence under s 16 of the *Wildlife Conservation Act*. If an Aboriginal person continued to take kangaroo unaware that their right has been restricted by the Governor they could be charged with an offence. With reference to these facts and the requirements of the defence of honest claim of right it could be argued that:

- the offence under s 16 of the *Wildlife Conservation Act* is an offence relating to property;¹⁸³
- the Aboriginal person had an honest belief that they were entitled to take kangaroo; and
- this belief would be of such a nature that if true it would exonerate the accused. This is because the belief relates to their civil right to take kangaroo as a consequence of the exemption.¹⁸⁴ Because of the restriction to that right imposed by the Governor the Aboriginal person is now mistaken about the extent of this right. If they had not been mistaken then they would have a valid defence to the charge.¹⁸⁵ As stated by Deane J in *Walden v Hensler*, a defence of honest claim of right will be available if what 'was claimed or believed would, if it were a fact, have negated an element of the actual offence or provided a good defence to it'.¹⁸⁶

The Commission is unaware of any case in Western Australia where honest claim of right has been successfully argued for an offence that relates to customary harvesting.¹⁸⁷ The availability of the defence appears to depend upon the precise nature of the offence and is untested in Western Australia. The

Commission considers that it is arguable that an Aboriginal person who has been engaging in an activity that was permitted under an exemption without knowing that this exemption had since been restricted or removed, could have a defence to a charge. However, it is noted that successful reliance on this defence could undermine conservation objectives by excusing Aboriginal people from engaging in conduct that has been prohibited in order to protect specific species of fauna (or flora). In Part VIII below, the Commission discusses the priorities of recognition and concludes that conservation must take priority over all other interests in land, including the interests of Indigenous peoples.¹⁸⁸ To clarify the legislative rights accorded to Aboriginal people in relation to customary harvesting, the Commission has therefore made proposals for more effective communication of the relevant legislative provisions and restrictions so that Aboriginal people are aware of their responsibilities under the law. This proposal is discussed in detail in Part VIII.¹⁸⁹

Native Title Defence

Although native title is expressly excluded from this reference, its relevance as a defence to a criminal charge is important. While the defence of honest claim of right is based upon a mistaken belief that Australian law recognises customary harvesting rights, a native title defence claims that Australian law does recognise those rights. Following the recognition of native title at common law in the High Court's decision in *Mabo v Queensland [No2]*¹⁹⁰ there have been a number of cases where a defendant, who has been charged with a criminal offence relating to taking or otherwise dealing with flora, fauna or fish contrary to Australian law, has relied on a defence of native title.¹⁹¹ While it would appear that the common law recognition of native title would have made these types of offences easier to

183. Note that s 1 of the *Criminal Code* (WA) defines property to include anything capable of ownership. Section 22 of the *Wildlife Conservation Act 1950* (WA) states that fauna is, until lawfully taken, the property of the Crown.

184. It has been held that the fact that a right arises under statute law rather than under common law is immaterial. See *Molina v Zaknich* [2001] WASCA 337, [103] (McKechnie J; Malcolm CJ and Templeman J concurring).

185. Pursuant to s 27C of the *Wildlife Conservation Act 1950* (WA) if an Aboriginal accused person pleads the exemption under s 23 in answer to a charge of taking protected fauna under s 16 then the accused bears the onus of proving the exemption. Therefore if the accused claimed that he or she held an honest (but mistaken) belief that he or she was exempted from the prohibition the accused would probably first have to prove that the conduct fell within the terms of the exemption.

186. *Walden v Hensler* (1987) 75 ALR 173, 188 (Deane J). Similarly, it was stated in *R v Waine* [2005] QCA 312 at [30] (Keane JA; McMurdo P and Wilson J concurring) that in order to establish an honest claim of right it is necessary to show that the right claimed if true would 'preclude what was done from constituting a breach of the relevant criminal law'.

187. Although the Commission acknowledges that honest claim of right may have been argued at a lower court level for which transcripts are not publicly available.

188. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights', below pp 375–76.

189. See below Proposal 73.

190. (1992) 175 CLR 1, 94 where Deane J and Gaudron JJ stated that native title rights could be 'asserted by way of defence in criminal and civil proceedings'.

191. See *Williams v. The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 72–77 for a discussion of these cases.

defend, the strict evidential requirements of native title have proved difficult to meet in practice.¹⁹²

Further, proof of native title does not necessarily mean that a native title holder is immune from all legislative provisions that regulate fishing, and the taking of flora and fauna.¹⁹³ The answer is found by an examination of the complex legislative provisions in this area, in particular the effect of s 211 of the *Native Title Act 1993* (Cth). If state legislation allows people to engage in conduct that would otherwise be contrary to the law (by the issuing of a licence, permit or other instrument), under s 211 native title holders will not be guilty of an offence on the basis that they did not have such a licence or permit. Therefore s 211 may override state legislation which would otherwise have the effect of regulating hunting and foraging activities for all people (including native title holders). For example, in *Wilkes v Johnsen*¹⁹⁴ the appellant had been charged with possessing protected fish (undersized marron) contrary to s 46(b) of the *Fish Resources Management Act 1994* (WA). The appellant claimed that he had a native title right to fish undersized marron. The majority of the Supreme Court upheld the appeal against the conviction finding that s 211 applied and therefore a native title holder was not required to comply with s 46(b) of the *Fish Resources Management Act*.¹⁹⁵ On the other hand s 211 will not operate to override state legislation that prohibits a specific activity for all persons.

As a consequence of the difficulty in relying on a native title as a defence, the Commission considers that the appropriate way to provide greater protection from criminal prosecution for Aboriginal people is for specific legislative recognition of customary harvesting rights. Due to the Commission's view that conservation must be the first priority and therefore any legislative recognition cannot be absolute, there will continue to be circumstances where Aboriginal people are exercising

their customary harvesting rights under a mistaken belief that they are entitled to do so. As discussed there are limited circumstances where a defence of honest claim of right may be available. The Commission's proposal in Part VIII for more effective communication to Aboriginal people of the complex legislative restrictions in this area should alleviate the potential for injustice.¹⁹⁶

Compulsion

The Different Categories of the Defence of Compulsion

When an accused is compelled to engage in prohibited conduct, Australian law recognises the lack of moral blameworthiness through the defence of compulsion. The defence reflects that the behaviour of the accused is not truly voluntary and therefore he or she should not be held criminally responsible. Section 31 of the *Criminal Code* (WA) includes different categories of the defence of compulsion; the most relevant of which for the purposes of this reference is the defence of duress (s 31(4)), which is discussed in detail below.

One of the defences of compulsion is that the offence was committed in execution of the law (Australian law).¹⁹⁷ This defence operates to excuse people, who by virtue of their official position, are required to engage in conduct that would otherwise break the law.¹⁹⁸ On this basis, Phillip Vincent suggested that Aboriginal people who are required under Aboriginal customary law to order and carry out traditional punishment should be permitted to do so.¹⁹⁹ This approach does not allow consideration of important issues, such as the age or consent of the person who receives the punishment. Accordingly, the Commission believes that a defence that applies irrespective of the particular circumstances does not provide adequate protection to those people who may receive traditional punishment.²⁰⁰

192. *Mason v Tritton* (1994) 34 NSWLR 572, 584 (Kirby P). See Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 16. See also Part VIII 'Proof of traditional harvesting rights at common law,' below pp 371–72.

193. Jeffery P, 'Escaping the Net: Native Title as a Defence to Breaching of Fishing Laws' (1997) 20 *University of NSW Law Journal* 352. In this article Peter Jeffery argues that general fisheries management laws should be construed as applying to native title holders. As stated by Kirby P in *Mason v Tritton* (1994) 34 NSWLR 572, 593 the decision in *Mabo (No 2)* did not imply that native title holders 'should be able to remove themselves from the ordinary regulatory mechanisms of Australian society'.

194. [1999] WASCA 74.

195. Wheeler and Kennedy JJ allowed the appeal and ordered that the matter be remitted back to the magistrate to be dealt with again. Originally the magistrate had not allowed any evidence of native title to be presented to the court and it is not known whether the appellant was able to meet the strict evidential burden when the case was reheard. Similarly, in *Yanner v Eaton* [1999] HCA 53 the majority of the High Court held that s 211 of the *Native Title Act 1993* (Cth) applied so that the appellant was not guilty of an offence of taking prohibited fauna without a licence.

196. See discussion under Part VIII 'The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights', below pp 375–76.

197. *Criminal Code* (WA) s 31 (1).

198. In *Mackinlay v Wiley* [1971] WAR 3, 10 (Virtue S.P.J.) it was said that s 31(1) operated to excuse people such as prison officers and bailiffs who are required to engage in conduct that may otherwise constitute an offence. The difference between conduct that is required and conduct that is voluntary assumed was considered in *R v Slade* [1995] 1 Qd R 390. In this case a police officer, who had supplied cannabis to an informant in order to penetrate a criminal gang, was unable to rely on the defence because he had not been required to break the law as part of his job as a police officer.

199. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 20. Phillip Vincent qualifies this recommendation by excluding certain serious offences from its application.

200. See discussion under 'Defences Based on Aboriginal Customary Law: General Defence', above pp 158–60.

Duress

The requirements of the defence of duress

The defence of duress relieves a person from criminal responsibility where the offence was compelled by threats. The specific requirements of the defence differ substantially between jurisdictions.²⁰¹ The rationale for the defence is to excuse criminal liability where a person has been faced with a choice between two evils: a choice of either committing the offence or suffering the harm that has been threatened.²⁰²

In Western Australia the defence is contained in s 31(4) of the *Criminal Code*.²⁰³ To satisfy the requirements of the defence:

- the accused must have done the act or made the omission in order to save himself or herself from immediate death or grievous bodily harm;
- death or grievous bodily harm must have been threatened by someone actually present and in a position to execute the threats; and
- the accused must have believed that he or she was otherwise unable to escape death or grievous bodily harm.

The defence in Western Australia is more restrictive than in many other Australian jurisdictions.²⁰⁴ The requirement that the threat must be of *immediate* death or grievous bodily harm has been interpreted to mean a 'very short time after doing the relevant act'.²⁰⁵ In common law jurisdictions it has been held that the threat must be present, continuing and imminent,²⁰⁶ although not necessarily immediate.²⁰⁷ Similarly, there is no requirement for the threat to be of immediate harm in Queensland,²⁰⁸ the Northern Territory²⁰⁹ or the Australian Capital Territory,²¹⁰ or under Commonwealth legislation.²¹¹



In most other Australian jurisdictions there must be a threat and the conduct giving rise to the offence must be a reasonable response to that threat.²¹² The nature of the threat is also more restrictive in Western Australia as there must be a threat to cause death or grievous bodily harm. The incorporation of an objective test of reasonableness (which is not contained in the Western Australian legislation) balances the broader scope of the defences in other jurisdictions. In Western Australia the threat must be directed to the accused and no other, whereas in most other jurisdictions a threat to harm another person may suffice.²¹³

Aboriginal customary law and the defence of duress

The principal behaviour under Aboriginal customary law that may involve a breach of Australian law is the infliction of traditional physical punishments. When relying on a defence of duress it is necessary to consider the reason why Aboriginal people may impose traditional punishment on others. In some circumstances it may be because they fear being subject to traditional punishment themselves.²¹⁴ The Commission's

201. For a discussion of the different requirements, see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [428].

202. *R v Howe* [1987] AC 417, 433 (Hailsham LJ).

203. The defence is not available for wilful murder, murder, grievous bodily harm or an offence that includes an intention to do grievous bodily harm. It is also not available when the accused has made himself or herself liable to such threats because of an unlawful association or conspiracy.

204. The defence in Tasmania is similar to Western Australia as it requires a threat of immediate death or grievous bodily harm: see *Criminal Code* (Tas) s 20.

205. *R v Pickard* [1959] QdR 457, 476 (Stanley J; Townley and Stable JJ concurring) as cited in *P (A Child) v The Queen* (Unreported, Supreme Court of Western Australia; Library No 950469S, No 222/1994, Kennedy J, 7 September 1995).

206. *R v Hurley* [1967] VR 526, 543 (Smith J).

207. A threat to cause harm at some future time was alluded to in *R v Abusafiah* (1991) 24 NSWLR 531, 538 (Hunt J). See also Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 360 where it was stated that in South Australia there does not have to be a threat of immediate harm.

208. *Criminal Code* (Qld) s 31(d) which provides that there must be a threat by some person in a position to carry out the threat.

209. *Criminal Code* (NT) s 40 which requires that the accused believe that the person making the threat was in a position to execute the threat.

210. *Criminal Code 2002* (ACT) s 40 which provides that there must be a threat that will be carried out unless the offence is committed; that there is no reasonable way to make the threat ineffective; and that the conduct is a reasonable response to the threat.

211. *Criminal Code 1995* (Cth) s 10.2. The defence under the Commonwealth legislation is the same as in Australian Capital Territory.

212. *Criminal Code* (NT) s 40 only refers to a threat; *Criminal Code* (Qld) s 31(d) refers to a threat to cause serious harm or detriment to a person or property; *Criminal Code 2002* (ACT) s 40 and *Criminal Code 1995* (Cth) s 10.2 refer only to a threat.

213. *Criminal Code* (Qld) s 31(d); *Criminal Code 2002* (ACT) s 40; *Criminal Code 1995* (Cth) s 10.2; *Criminal Code* (NT) s 40.

214. For example, the ALRC referred to *R v Isobel Phillips* (Unreported, Northern Territory Court of Summary Jurisdiction, 19 September 1983). In this case the accused was required by customary law to fight any woman who was involved with her husband. Failure to do so would result in death

consultations revealed mixed views as to whether compliance with Aboriginal customary law is the result of the exercise of choice, is achieved because of the fear of repercussions, or is a consequence of a belief in the validity of the law.²¹⁵

Elizabeth Eggleston argued that the defence of duress might be appropriate in some cases if an Aboriginal person was forced through fear of traditional punishment to commit an offence against Australian law.²¹⁶ In this regard she distinguished conduct that was obligatory under Aboriginal customary law from conduct that is viewed as justifiable.²¹⁷ Based on this analysis, only obligatory conduct could potentially provide the source for duress. Anthropological accounts indicate that kinship obligations may require an Aboriginal person to punish another regardless of his or her personal feelings and therefore in some cases there is a duty to inflict traditional punishment.²¹⁸ The ALRC found that traditionally orientated Aboriginal people generally follow their customary laws 'not just because of fear of punishment, but because of belief in their legitimacy'.²¹⁹ However, the ALRC concluded that in some situations Aboriginal people follow customary law voluntarily while in other cases they may do so under duress.

In *R v Warren, Coombes and Tucker*²²⁰ the defence of duress was argued by three Aboriginal men who had been charged with serious offences of violence. They claimed that they were required to inflict the injuries on the victim as traditional punishment for the victim's breach of customary law. The defendants stated that if they had not imposed the traditional punishment they would have received the same punishment themselves. The trial judge held that the defence of duress was not available; however, on appeal it was

accepted by the majority that an obligation under Aboriginal customary law could provide a basis for the defence of duress. In this case the court held that duress was not applicable because the explanation given by the defendants was not believed. The trial judge had found that the motivation for the assault was for a 'show of strength'.²²¹

Problems with the Defence of Duress in Western Australia for Aboriginal People

Requirement of a threat to harm the accused

In Western Australia, for the defence of duress to be available a threat must have been made, by a person actually present, against the accused. The defence would have no application unless a particular person threatened the accused with traditional punishment amounting to death or grievous bodily harm if he or she failed to comply with Aboriginal customary law.²²² An Aboriginal person may commit an offence not because a specific individual made a threat but because of knowledge of the repercussions that would flow from a failure to comply with Aboriginal customary law.²²³ The Commission does not consider that it is appropriate to remove the requirement that there must actually be a threat. The removal of this requirement would unjustifiably extend the scope of the defence. It would allow people to be excused from criminal conduct merely because they feared that they would be harmed, even if this fear was unfounded.

In the context of the present discussion it should be noted that s 31(4) of the *Criminal Code* (WA) is not available if the threat was to harm another person. Therefore, an Aboriginal person would not be able to rely on a threat to harm a member of his or her family.

or serious injury and while she remained in her community she would be unable to avoid these consequences. The magistrate acquitted the accused on the basis of the defence of duress. See ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [430].

215. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23 where it was stated that traditional law is not a choice because it is a 'part of who you are'. Some communities expressed the view that there was no choice to comply because of repercussions that may follow to family members. This was in the context of the failure of a person who was liable for traditional punishment presenting himself or herself for that punishment: see LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 41–42; *Pilbara*, 6–11 April 2003, 8–9; *Geraldton*, 26–27 May 2003, 13–14; *Wiluna*, 27 August 2003, 22. Other Aboriginal people said that there was a choice as to whether a person would be subject to Aboriginal customary law: see LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 22–23; *Geraldton*, 26–27 May 2003, 14.

216. Eggleston E, *Fear, Favour or Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 297–98.

217. *Ibid* 279.

218. See ALRC, 'Traditional Aboriginal Society and Its Law' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 217; Toohey J *Understanding Aboriginal Law* (1999) 29 in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004).

219. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [430]. See also Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 19.

220. (1996) 88 A Crim R 78.

221. *Ibid* 81 (Doyle CJ; Cox J concurring).

222. In *R v Warren, Coombes and Tucker* (1996) 88 A Crim R 78, 81–82 Doyle CJ was not convinced that at common law there had to be a requirement for a threat from an 'external source'; however, it was not necessary for him to decide the issue.

223. Leader-Elliott I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 361.

Requirement for immediate threat

The necessity for a threat of immediate death or grievous bodily harm would appear to preclude any reliance upon duress where the actions were taken in carrying out Aboriginal customary law. The Commission is unaware of any example where traditional punishment has followed immediately after an Aboriginal person has refused to comply with an obligation under customary law. Traditional punishment usually occurs some time after a violation of customary law and therefore it would be difficult for an Aboriginal person to argue that he or she feared immediate harm.²²⁴

The Commission's view

The Commission considers that the reasons an Aboriginal person would comply with Aboriginal customary law would depend upon the individual circumstances of the case. In some situations it may be a genuine fear of the consequences that might follow; in other circumstances it may be because of a belief in the legitimacy of customary law. For this reason the ALRC did not support any extension of the defence of duress to better accommodate issues that may arise under Aboriginal customary law.²²⁵ While the Commission accepts that there are different reasons why Aboriginal people comply with their customary laws, it does not agree with this conclusion. An extension of the defence of duress does not imply that all Aboriginal people follow their customary law because of the fear of repercussions. Instead, it recognises that some Aboriginal people may be forced to inflict traditional punishment because they were compelled by threats. The Commission stresses that amending the defence of duress, by removing unnecessary restrictions, does not mean that all Aboriginal people will be able to rely on the defence whenever they breach Australian law.

In reaching the conclusion that the defence of duress is unduly restrictive in Western Australia, the Commission had also taken into account the fact that the defence is potentially gender biased. For example, women who are the victims of serious domestic or family violence may be compelled to commit an offence under a threat of being harmed in the future. The requirement for a threat of immediate harm would preclude reliance on the defence. Importantly, any amendments to the defence of duress will apply equally to Aboriginal people and non-Aboriginal people. The Commission has reviewed the defence of duress in other jurisdictions and considers that the defence as it exists in the Australian Capital Territory and the Commonwealth provides a useful model.²²⁶ In these jurisdictions, in order to rely on the defence, it is necessary that:

- a threat has been made that will be carried out unless the offence is committed;²²⁷
- there is no reasonable way to make the threat ineffective;²²⁸ and
- the conduct is a reasonable response to the threat.

The defence in these jurisdictions can apply to any offence including murder and grievous bodily harm.²²⁹ The question of whether the defence of duress should be available for murder and in what form, will be considered in the Commission's reference on homicide.²³⁰ At this stage, the Commission proposes that the restrictions on the nature of the threat be removed. The defence should be available if an Aboriginal person is forced to break the law as a consequence of a threat of a future punishment under Aboriginal customary law. A requirement that the conduct giving rise to the offence must be a reasonable response to the threat provides a safeguard against any abuse of this defence.²³¹

224. For example, it is stated by Berndt and Berndt that 'settlement by duel' was not held immediately following an offence at customary law, but after there was time for anger to cool: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 350.

225. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [430].

226. See *Criminal Code* 1995 (Cth) s 10.2 and *Criminal Code* 2002 (ACT) s 40 and note that both provisions restrict the operation of the defence to persons who voluntarily associate with others who engage in criminal conduct thereby making themselves liable to such threats.

227. Therefore the threat can be made to harm the accused or some other person.

228. This element incorporates the requirement to escape contained in s 31(4) of the *Criminal Code* (WA) as well as under the common law. It has been held that the defence of duress at common law was available for a woman who committed social security fraud because of her fear of violence by her abusive husband. The fact that she had not sought help from the police was not fatal to her defence as it was held that she was not expected to leave her marital relationship: see Leader-Elliot I, 'Warren, Coombes and Tucker' (1997) 21 *Criminal Law Journal* 359, 362. This reasoning could also apply to an Aboriginal person who, due to his or her strong ties to the community, should not necessarily be expected to leave.

229. Under the Western Australian Criminal Code a person who has been threatened with death will not be excused for killing or even for causing grievous bodily harm to save them from death. The requirement in the ACT and Commonwealth that the response must be reasonable would be considered in this context.

230. LRCWA, Project No 97.

231. Criminal Law Officers Committee of the Standing Committee of Attorney Generals, *Model Criminal Code: Chapters 1 and 3, General Principles of Criminal Responsibility* (December 1992) 65.

Proposal 21

That s 31(4) of the *Criminal Code* (WA) be amended to remove the requirement that there must be a threat of *immediate death or grievous bodily harm*.

That s 31(4) be amended to provide that the threat may be directed towards the accused or to some other person.

That the defence be based on the defence in Australian Capital Territory and the Commonwealth.

Provocation

The Basis for the Defence of Provocation

The defence of provocation has been described as a 'concession to human frailty'.²³² Provocation recognises that a person may not be morally blameworthy if he or she commits a crime as a consequence of a sudden loss of self-control, usually as a result of anger.²³³ The historical basis for the defence can be traced back to 16th century England. It developed following altercations arising from 'breaches of honour', such as fights between men and violent reactions to adultery committed by a man's wife.²³⁴ The relevance of the defence in contemporary society has been questioned.²³⁵ The Commission notes that this issue is currently being considered in its review of the law of homicide.²³⁶ The discussion that follows is therefore limited to an examination of whether the defence

adequately allows cultural and customary law issues to be taken into account.

In Western Australia the defence of provocation is available as a partial defence to wilful murder and murder. If accepted, provocation will reduce a charge of wilful murder or murder to manslaughter. It is also a complete defence for offences that require proof of an assault.²³⁷ For example, the defence can operate to excuse criminal liability for an offence of assault occasioning bodily harm but not for an offence of unlawful wounding.²³⁸ While the precise elements of the partial defence for wilful murder (and murder) and the defence for offences of assault are different, the essential characteristics are the same:

- The provocation (wrongful act or insult) must be of such a nature that an ordinary person could have been provoked to react in a similar way to the accused.
- The accused must have been deprived of the power of self-control.
- The accused must have acted suddenly and before there was time for his or her passion to cool.²³⁹

While the exact requirements of the defence of provocation differ between jurisdictions,²⁴⁰ there is general uniformity in the underlying principles.²⁴¹

The defence of provocation has been the subject of extensive debate and criticism.²⁴² Over the past decade a number of law reform agencies have examined the defence of provocation and some have recommended its abolition.²⁴³ The primary rationale for abolition of

232. Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 84.

233. It has been observed that 'anger is primarily a feature of provocation and fear a feature of self-defence'; however, loss of self-control may be a result of both anger and fear. See *Masciantonio v The Queen* (1995) 129 ALR 575, 582 (Brennan, Deane, Dawson and Gaudron JJ).

234. VLRC, *Defences to Homicide*, Final Report (October 2004) 21–23. In particular note that the defence originated at a time when the death penalty was a mandatory penalty to offences of homicide.

235. Ibid 21–58.

236. LRCWA, Project No 97.

237. Sections 245 and 246 of the *Criminal Code* (WA) set out the requirements of the defence for offences of assault. The partial defence of provocation is contained in s 281 of the *Criminal Code* (WA). At common law provocation is only available as a partial defence to murder. The position in Queensland is the same as Western Australian: see *Criminal Code* (Qld) ss 268, 269 & 304. In the Northern Territory the defence is available as both a partial defence to murder and as a complete defence to all offences other than those causing death or grievous bodily harm: see *Criminal Code* (NT) s 34.

238. See *Kaporonovski v The Queen* (1975) 133 CLR 209. Pursuant to s 318 of the *Criminal Code* (WA) the elements of an offence of assault occasioning bodily harm are that the accused unlawfully assaulted the victim and caused bodily harm. The elements of unlawful wounding in s 301 of the *Criminal Code* (WA) are that the accused unlawfully wounded the victim and therefore, the prosecution is not required to prove an assault as defined in s 222 of the Code. The anomaly with respect to the availability of defences for these two offences is discussed under 'Consent', above p 163.

239. See *Criminal Code* (WA) ss 245, 246 & 281.

240. For the requirements of the defence in other jurisdictions, see *Crimes Act 1900* (ACT) s 13; *Crimes Act 1900* (NSW) s 23; *Criminal Code* (NT) s 34; *Criminal Code* (Qld) ss 268, 269 & 304.

241. *Stingel v The Queen* (1990) 97 ALR 1, 6; *Hart v The Queen* [2003] WASCA 213, [34] (Steytler J).

242. For a full discussion of the criticisms, see VLRC, *Defences to Homicide*, Final Report (October 2004); NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) [2.7].

243. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code Chapter Five: Fatal offences against the person*, Discussion Paper (June 1998) 83; VLRC, *Defences to Homicide*, Final Report (October 2004) 58. The VLRC considered a number of criticisms of the defence and recommended that it should be abolished as a partial defence to murder. The defence has been abolished in Tasmania. The Commission notes that arguments in support of abolishing the partial defence of provocation recognise that in most jurisdictions mitigatory issues associated with any provocation and loss of self-control can be taken into account in discretionary sentencing decisions. See NSWLRC, *Partial Defences to Murder: Provocation and Infanticide*, Report No 83 (1997) [2.7]. However, in Western Australia there is still a mandatory sentence of life imprisonment for wilful murder and murder.

the defence is that extreme anger—while possibly providing an explanation for an offence—should not provide an excuse. One of the major criticisms is that the defence of provocation is gender biased: the requirement that the accused must have responded suddenly to the provocation before there was time for passions to cool, may not accommodate the experiences of women who may respond to serious and persistent physical abuse at a time when there is a lull in the violence.²⁴⁴ Another pertinent criticism is that the objective test, on which the defence relies, is complex and potentially unfair to minorities. This is considered in more detail below.

Aboriginal Customary Law and the Defence of Provocation

In the context of its application to Aboriginal people the question arises whether the defence of provocation sufficiently allows cultural matters, in particular conduct that infringes Aboriginal customary law, to be taken into account. The objective test, whether the provocation is of such a nature that an ordinary person could have been provoked to react in a similar way to the accused, is split into two distinct stages.²⁴⁵ The first stage is the assessment of the gravity of the provocation. Australian law permits cultural issues (as well as other factors personal to the accused) to be taken into account when assessing the seriousness of the provocation.²⁴⁶ However, once the second stage has been reached (whether an ordinary person would have been deprived of the power of self-control) the only personal characteristic of the accused that may be attributed to the ordinary person is age.²⁴⁷ A useful statement of the test, as set out by the High Court in *Stingel*²⁴⁸ and which has been held to apply to provocation in Western Australia, is:

In the first stage, the gravity of the provocation is assessed by reference to particular characteristics of the accused which may be relevant. Such characteristics may include age, race, sex, personal history and other factors. The result of that assessment is a characterisation of the provocation somewhere of a scale of gravity, ranging from minor and trivial to extreme. The next question involves an assessment of how an ordinary person could have responded to provocation of that particular degree of gravity. It would appear that the second limb is a relatively simple filter designed to ensure that the law does not excuse an extreme response to minor provocation.²⁴⁹

The objective test

Assessing the gravity of the provocation

The personal characteristics of an accused should be considered when assessing the nature and seriousness of the provocation because conduct that may not be 'insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history'.²⁵⁰ This is clearly the case with matters that would constitute a breach of Aboriginal customary law. For example, the utterance of a deceased person's name would not cause difficulty for a non-Aboriginal person, but such conduct could be extremely offensive and upsetting for an Aboriginal person.

Case law has established that issues relating to Aboriginal culture and background may provide grounds for a defence of provocation. For example, in *Verhoeven v Ninnette*²⁵¹ racial taunts directed to an Aboriginal woman were taken into account as provocation for an assault. Importantly, the court emphasised that it was not enough to simply describe the provocation as a 'racial taunt'. Because of the negative connotations

244. VLRC, *Defences to Homicide*, Report (October 2004) 27. See also NTLRC, *Self Defence and Provocation* (October 2000) 41; ALRC, *Equality Before the Law: Justice for women*, Report No 69 (1994) [12.6]–[12.7]. Courts have received evidence in relation to 'battered women's syndrome' to overcome some of the difficulties with the defence of provocation (as well as self defence and duress). The syndrome presumes that women who have been the victims of repeated violence suffer from 'learned helplessness' and as a consequence are unable to leave the violent relationship. The Commission is aware that the reliance on battered woman's syndrome may be ineffective for Aboriginal women because some Aboriginal women fight back against family violence and therefore do not fit neatly within the definition. Also as the syndrome focuses on the psychology of the accused it may be ineffective in taking into account cultural issues that prevent Aboriginal women from leaving their partner and community. See Stubbs J & Tolmie J, 'Race, Gender and the Battered Woman Syndrome: An Australian case study' (1995) 8 *Canadian Journal of Women and the Law* 122, 123–42.

245. Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 74.

246. See *Hart v The Queen* [2003] WASCA 213, [49] (Steytler J; McClure and Pullin JJ concurring) approving the test as set out in *Stingel v The Queen* (1990) 97 ALR 1, 9.

247. In *Stingel v The Queen* (1990) 97 ALR 1, 12–13 it was stated by the High Court that the age of the accused can be attributed because the 'process of development from childhood to maturity is something which, being common to us all, is an aspect of ordinariness'. The reason for the concession for age is that generally young people are less capable of self-control than more mature adults. See Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 88.

248. (1990) 97 ALR 1.

249. *Verhoeven v Ninnette* [1998] WASCA 73 (Unreported, Supreme Court of Western Australia, Library No 980162, Wheeler J, 23 October 1997) 8.

250. *Masciantonio v The Queen* (1995) 129 ALR 575, 581 (Brennan, Deane, Dawson and Gaudron JJ).

251. [1998] WASCA 73 (Unreported, Supreme Court of Western Australia, Library No 980162, Wheeler J, 23 October 1997).

that can be implied by racial abuse directed towards Aboriginal people, it is necessary to assess the provocation from the point of view of the accused.²⁵² Aboriginal customary law was specifically taken into account in *Lofty v The Queen*.²⁵³ In this case the appellant was convicted of the murder of his wife. The killing occurred after the appellant discovered that his wife was planning to leave him for another man. A relationship with this other man was prohibited under Aboriginal customary law. The court approved the trial judge's direction that a breach of Aboriginal customary law can be taken into account when assessing the gravity of the provocation.²⁵⁴

Assessing the ordinary person's capacity for self-control

Once the gravity of the provocation has been established, it is then necessary to assess how an ordinary person would have reacted to provocation of that degree of seriousness.²⁵⁵ The law in Western Australia does not permit characteristics of the accused (such as Aboriginality or particular cultural beliefs) to be attributed to the ordinary person:²⁵⁶ the ordinary person has been referred to as a 'truly hypothetical ordinary person'.²⁵⁷ The continuing debate in relation to the defence of provocation is usually centred on the test for the ordinary person's capacity for self-control.

Arguments against the ordinary person test

It has been observed that the two-stage process of the objective test requiring a jury 'to distinguish between questions relating to the gravity of the provocation and questions relating to the capacity for self-control'²⁵⁸ is too complex to understand. A jury is

entitled to take into account all of the accused's characteristics and background when considering the seriousness of the provocation. It is then expected to disregard all of these factors (except age) when assessing whether an ordinary person could have lost self-control.

It has also been argued that the ordinary person test does not logically reflect the rationale behind the defence of provocation; that is, that a person is less culpable when there is a loss of self-control compared to someone who acts with premeditation. In these circumstances perhaps the focus should be on the accused person's state of mind, rather than on some hypothetical ordinary person. Reflecting this, it has been suggested that the test should be purely subjective, such that the question becomes not whether the ordinary person would lose self-control but whether the accused did in fact lose self-control.²⁵⁹

The most relevant argument against the ordinary person test, for the purposes of the current discussion, is that it is potentially discriminatory and unfair to members of ethnic groups. There is widespread support for the view that the ordinary person test is inappropriate because of the diverse nature of multicultural society today.²⁶⁰ It is argued that a jury, when deciding whether an ordinary person could have lost self-control, will generally impose the standards of the dominant group. Thus ethnic minorities, that may have different values and standards, will be required to conform to the standards of Caucasian people.²⁶¹

In his background paper, Philip Vincent argued that the ordinary person test should refer to an ordinary person of the same culture and environment as the accused.²⁶² In support of this argument Vincent refers

252. Ibid 11–12 (Wheeler J) Thus referring to an Aboriginal person as a 'black' would be viewed as more serious provocation than a reference to a Caucasian person as a 'white ...'. This is because in Australian society there have never been any negative connotations associated with being white. For a detailed consideration of the extent of racism towards Aboriginal people in Western Australia, see discussion under Part II 'Racism and Reconciliation', above pp 31–34.

253. [1999] NTSC 73.

254. Ibid [39] (Martin CJ; Mildren and Riley JJ concurring).

255. *Lewis v Dickinson* [2001] WASCA 95, [9] (Scott J).

256. There have been some cases in the Northern Territory that have allowed the individual characteristics of the accused to be taken into account. For example in *Jabarula v Poore* (1989) 68 NTR 26, 33 it was held that an ordinary person should be an ordinary Aboriginal person from the same community as the accused. In *Mungatopi v R* (1991) 2 NTLR 1 where it was decided that the decision of the High Court in *Stingel v R* did not apply to the defence of provocation under the *Criminal Code* (NT). Note that s 34(1)(d) requires that an ordinary person *similarly circumstanced* would have acted in the same or a similar way. Stanley Yeo comments that these cases are 'objectionable because they regard Aboriginal people as possessing lesser capacity for self-control than other ethnic groups': see Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316.

257. *Stingel v The Queen* (1990) 97 ALR 1, 11.

258. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code Chapter Five: Fatal offences against the person*, Discussion Paper (June 1998) 75. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.56]; Weinberg M, 'Moral Blameworthiness – The 'Objective Test' Dilemma' (2003) 24 *Australian Bar Review* 1, 19.

259. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.19]–[2.20].

260. Model Criminal Code Officers Committee of the Standing Committee of Attorney-Generals, *Model Criminal Code Chapter Five: Fatal offences against the person*, Discussion Paper (June 1998) 80.

261. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.55]; *Masciantonio v The Queen* (1995) 129 ALR 575, 586 (McHugh J).

262. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 21. This argument was also referred to in Weinberg M, 'Moral Blameworthiness – The "Objective Test" Dilemma' (2003) 24 *Australian Bar Review* 1, 18.

to the comments of McHugh J in *Masciantonio v The Queen*²⁶³ that where the ordinary person test fails to accommodate the cultural background of an accused the law of provocation is 'likely to result in discrimination and injustice'.²⁶⁴ McHugh J argued that in order to achieve true equality before the law in a multicultural society it is necessary that the law of provocation for one group of people be different to the law of provocation for another.²⁶⁵

Arguments in support of the ordinary person test

The rationale for the ordinary person test is to ensure that all people are held to the same standard regardless of individual traits and capacities.²⁶⁶ Accordingly, the ordinary person test provides a minimum standard that is necessary for the protection of the public. In *Stingel v The Queen*²⁶⁷ the High Court stated that:

No doubt, there are classes or groups within the community whose average powers of self-control may be higher or lower than the community average. Indeed, it may be that the average power of self-control of the members of one sex is higher or lower than the average power of self-control of members of the other sex. The principle of equality before the law requires, however, that the differences between different classes or groups be reflected only in the limits within which a particular level of self-control can be characterised as ordinary.²⁶⁸

If the test was purely subjective (that is, whether the accused lost self-control), then it has been suggested that any killing that occurred as a consequence of loss of self-control would be partially excused.²⁶⁹ In its report

on *Multiculturalism and the Law*, the ALRC concluded that there is a need for a 'uniform standard to be observed by all where necessary for the protection of individuals and society'.²⁷⁰

While cultural differences are taken into account when assessing the gravity of the provocation it has been suggested that there is no justification for taking cultural differences into account when considering the capacity to lose self-control.²⁷¹ In support of this, it is maintained that any suggestion that one cultural group has a greater or lesser capacity for self-control is mere speculation.²⁷² In particular, it has been asserted that any suggestion that Aboriginal people have a lesser capacity for self-control is offensive.²⁷³

If cultural differences were able to be attributed to the ordinary person, it has been asserted the test would be open to abuse.²⁷⁴ For example, expert evidence might be led to infer that a particular cultural group has a lesser capacity for self-control because members of the group are more prone to violence. This argument of course would be flawed because prevalence of violence does not equate to a different capacity for self-control.²⁷⁵ If an ordinary person, for the purpose of assessing capacity for self-control, was considered to be an ordinary Aboriginal man from the same background as a particular accused, the prevalence of violence by some Aboriginal men against Aboriginal women might be used to argue that Aboriginal men have a lesser standard of self-control. If this approach was accepted by the courts the law might not provide Aboriginal women with adequate protection.²⁷⁶

263. (1995) 129 ALR 575.

264. Ibid 586.

265. Ibid (McHugh J). McHugh J was part of the majority in *Stingel v The Queen* and then dissented in *Masciantonio v The Queen*. This change of heart was based on the arguments of Stanley Yeo, who subsequently changed his mind and agreed with Ian Leader-Elliott that there is no justification for assuming that different cultures have different capacities for self-control. Yeo now argues that the test of whether an ordinary person could have lost self-control and reacted in the way that the accused did should be separated into two stages. The capacity for self-control should be based upon an ordinary person of the same age. However, he maintains that the response or type of reaction of an ordinary person should be based on an ordinary person of the same age, sex and cultural background as the accused. See Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 305.

266. *Stingel v The Queen* (1990) 97 ALR 1, 9.

267. (1990) 97 ALR 1.

268. Ibid 12. It has been noted that if the ordinary person was an ordinary person of the same gender it may be argued that men have a lower capacity for self-control in order to excuse some men for violence against women. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.68].

269. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.60].

270. ALRC, *Multiculturalism and the Law*, Final Report No 57 (1992) 187. The ALRC noted that standards of reasonableness are not static and can evolve to take into account the cultural diversity of Australian society. As stated in *Stingel v The Queen* (1990) 97 ALR, 11 the ordinary person test will be 'affected by contemporary conditions and attitudes'. The ordinary person today would be viewed differently than the ordinary person 200 years ago.

271. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.61]. See also Law Society of Western Australia, Written Submission, 19 October 2005.

272. See NSWLRC, *Partial Defences to Murder: Provocation and infanticide*, Report No 83 (1997) [2.61] and Leader-Elliott I, 'Sex, Race and Provocation: In Defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 89–90.

273. Yeo S, 'Sex, Ethnicity, Power of Self-Control and Provocation Revisited' (1996) 18 *Sydney Law Review* 304, 316.

274. Leader-Elliott I, 'Sex, Race and Provocation: In defence of *Stingel*' (1996) 20 *Criminal Law Journal* 72, 90.

275. Ibid.

276. *Verhoeven v Ninyette* [1998] WASCA 73 (Unreported, Supreme Court of Western Australia, Library No 980162, Wheeler J, 23 October 1997) 20–21.

The Commission's View

The Commission considers that there are compelling arguments both in support of and against the ordinary person test. Bearing in mind that the Commission is currently examining defences to homicide in another reference, it believes that it is premature at this stage to propose any changes to the ordinary person test or to the law of provocation in general. The Commission therefore seeks submissions as to whether the ordinary person test when assessing capacity for self-control should be amended to allow cultural matters to be taken into account. The Commission stresses that issues under Aboriginal customary law can currently be taken into account when assessing the gravity of the provocation. In this regard it is vital that relevant and reliable evidence of Aboriginal customary law can be presented to the court. Proposals to improve the presentation and consideration of evidence of Aboriginal customary law are discussed below.²⁷⁷

Invitation to Submit 6

The Commission invites submissions as to whether the ordinary person should be defined as an ordinary person of the same cultural background as the accused for the purposes of assessing both the gravity of the provocation and determining whether an ordinary person could have lost self-control.

Discipline of Children

The Commission's consultations indicated that many Aboriginal people were concerned about the discipline of their children. Many Aboriginal people believe that welfare agencies have interfered with their right to discipline their children.²⁷⁸ For example, some Aboriginal people were concerned when young people threatened families with 'white man's law' if they attempted to impose any type of physical discipline.²⁷⁹

In Geraldton, it was alleged that Australian law had undermined traditional authority and did not recognise Aboriginal child-rearing practices that involved physical discipline.²⁸⁰

The Position under Traditional Law

In traditional Aboriginal societies disciplining children was the responsibility of the immediate family, including older siblings who were expected to protect and discipline younger children.²⁸¹ Anthropological studies have found, that while physical chastisement such as slapping did occur at times, punishment that was severe or drawn out was rare.²⁸² Childhood, which ended at puberty or initiation, was characterised by instruction about kinship rules and general freedom with few restrictions imposed.²⁸³ At the time of puberty or initiation discipline shifted from the immediate family to the 'tribal group'.²⁸⁴ According to Robert Tonkinson, children were rarely punished or chastised. In fact, when children were physically punished by missionaries, parents would vent their disapproval.²⁸⁵ Tonkinson explained that physical discipline such as slapping would be used only where a child was threatening violence to a younger sibling or a parent who was unwell. In other situations, especially those that involved breaches of kinship obligations (which children were not required to strictly observe) the child may be scolded or ridiculed.²⁸⁶ On the other hand there is limited evidence that strong physical discipline of children occurred in some traditional Aboriginal societies.²⁸⁷

The Contemporary Position

In this discussion the Commission distinguishes the issue of physical discipline from child abuse. Reasonable physical discipline is permitted under Australian law provided that it is for the purpose of correction and not retribution.²⁸⁸ Any physical violence to a child that is not for the purpose of correction is unacceptable. Catherine Wohlan observes in her background paper, that in Aboriginal communities, family members who

277. See Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure', below pp 385–416.

278. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 40.

279. See Part II 'Children and Youth', above pp 20–22. The Commission notes, however, that during the consultations in Derby it was said that the image of a young person armed with legislation is a myth: see LRCWA, *Thematic Summaries of Consultations – Derby*, 4 March 2004, 52.

280. LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 12.

281. Tonkinson R, 'MarduJarra Kinship' in Edwards WH (ed), *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 152.

282. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 339.

283. Tonkinson R, 'MarduJarra Kinship' in Edwards WH (ed) *Traditional Aboriginal Society* (Melbourne: MacMillan, 2nd ed., 1998) 151.

284. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 4th ed., 1988) 339–40.

285. Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings, 1974) 49, 130.

286. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rhinehart and Winston, 1978) 64–67.

287. Gilbert K, 'Living Blacks: Blacks Talk to Kevin Gilbert' (Melbourne: Penguin, 1977) 33–34.

288. The nature of the discipline of children defence is discussed immediately below.

take out their stress on children are met with disapproval. Grandmothers in particular will intervene if they consider that a child is being 'senselessly beaten'.²⁸⁹ The issue here is whether there is any conflict between physical discipline of children that is legitimate under Aboriginal customary law and that which is permitted under Australian law.

From a contemporary perspective, Wohlan describes the 'ritual' punishment of two teenage girls in Balgo who received a public hiding from their parents (in the presence of police officers) for engaging in the conduct of sniffing petrol (and committing offences under Australian law).²⁹⁰ Katherine Trees describes the breakdown of some aspects of traditional law concerning the discipline of children in Roebourne. One Aboriginal woman described that in the past other adult family members would smack a child; however, today the parents may sometimes object to other people disciplining their children.²⁹¹ Another Aboriginal woman said that when her children were young and did something wrong she would hit them or throw a stone at them.²⁹²

Discipline of Children under the *Criminal Code*

Section 257 of the *Criminal Code* (WA) provides that:

It is lawful for a parent or a person in the place of a parent, or for a schoolmaster, to use, by way of correction, towards a child or pupil under his care, such force as is reasonable under the circumstances.

There are limits on the right to discipline a child. The punishment must be moderate and reasonable; it must be appropriate taking into account the child's age,

physique and mental development; and it must be carried out with a reasonable instrument.²⁹³ The punishment must be for the purpose of correction and not for retribution.²⁹⁴ When considering what is reasonable it is necessary to take into account current community standards:²⁹⁵ what was acceptable many years ago in mainstream Australia would no longer be considered acceptable today. The Tasmanian Law Reform Institute considered the defence of reasonable correction in detail. Its 2003 report showed that the interpretation by courts of similar defences in other jurisdictions does not provide any clear guidance as to what is acceptable and what is not.²⁹⁶ Amendment to the law in some jurisdictions has reflected changes in the community's attitude to what is acceptable, particularly in relation to the extent of physical punishment that is allowed in schools.²⁹⁷ In Western Australia corporal punishment is prohibited as a matter of education policy; however, s 257 of the *Criminal Code* is still applicable to the issue of criminal responsibility if corporal punishment takes place in an education setting.²⁹⁸ While research has shown that the majority of Australian parents smack their children and consider that physical punishment of children is acceptable, there is a growing trend of opinion that physical punishment is ineffective and undesirable.²⁹⁹ While physical correction such as smacking may be lawful in Western Australia more serious instances where a child receives injuries or is punished with an instrument may be viewed differently in the current climate.

Resolving the Issue for Aboriginal People

In June 2005 it was reported that the Federal Health Minister, Tony Abbot, was told by Aboriginal Elders in

289. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 40.

290. Ibid. In addition to the physical punishment the girls were 'mentored'.

291. Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 25.

292. Ibid 26.

293. *R v Terry* [1955] VLR 114, 116–17 (Scholl J).

294. *Higgs v Booth* (Unreported, Supreme Court of Western Australia, Library No 6420, 29 August 1986) as cited in *Cramer v R* (Unreported, Supreme Court of Western Australia, Court of Criminal Appeal, Library No 980620, White J, 28 October 1998) 4.

295. Ibid.

296. Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No 4 (2003) 8.

297. In Tasmania and New South Wales it is illegal to use corporal punishment in all schools. In Australian Capital Territory, South Australia and Victoria it is illegal to use corporal punishment in public schools (including smacking): see Royal Australian College of Physicians, *Paediatric Policy: Physical punishment and discipline* at <<http://www.racp.edu.au/hpu/paed/punishment/index.htm>>.

298. See National Committee of Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990): see <<http://www.aic.gov.au/publications/vda/vda-sec23.html>> and see also <<http://www.endcorporalpunishment.org/pages/frame.html>>. For example, Sweden has abolished the defence and in New South Wales the *Crimes Act 1900* (NSW) s 61AA provides that it is illegal to use any force to the head or neck area of a child or to use any force that causes harm lasting for more than a short period. See Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No 4 (2003) 16–17. Other countries such as Finland, Denmark and Norway also prohibit any physical punishment of children: see National Committee of Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990) <<http://www.aic.gov.au/publications/vda/vda-sec23.html>> 6.

299. The Tasmanian Law Reform Institute's primary recommendation was to abolish the defence of reasonable correction: see Tasmanian Law Reform Institute, *Physical Punishment of Children*, Final Report No 4 (2003) 26 & 47. Information available on the website for the Department of Community Development refers to the potential dangers and general ineffectiveness of physical punishments: see 'Keeping Our Kids Safe' <<http://www.community.wa.gov.au>>.

Alice Springs that they were unable to do anything in response to uncontrollable behaviour by some young people because if they were to smack them the authorities would intervene. Mr Abbot assured this group that parents who acted with 'caution and restraint' would not have a problem with Australian law and indicated with surprise the 'cultural confusion' that existed about this issue.³⁰⁰ This misapprehension is familiar to the Commission. As stated above, the Commission was told by numerous Aboriginal people that Australian law prevented them from using physical punishment on their children. While the Commission does not wish to specifically promote the use of physical discipline, it considers that Aboriginal people in Western Australia should be made aware that they currently have the same right as any other Australian to discipline their children in a reasonable way bearing in mind the child's individual characteristics. While it remains lawful to discipline a child physically, it is vital that Aboriginal families (as well as other Australians) are informed about what are the appropriate limits.³⁰¹

The anthropological evidence referred to above suggests that for children in traditional Aboriginal societies, physical discipline was rare and when used it was generally of a reasonable nature. The difficulty arises with older Aboriginal children who have reached puberty or undergone initiation. Because they may be considered adults in Aboriginal society they may be subject to traditional physical punishments such as spearing. The question of whether a child (as defined under Australian law) should be able to consent to traditional punishments is discussed earlier.³⁰² Australian law concerning childhood discipline does not appear to conflict with Aboriginal customary law practices. Further, as Wohlan alludes, there are other mechanisms currently being employed by Aboriginal people to control the behaviour of young people that do not involve physical punishments but rather focus on reconnecting young people to their culture.³⁰³ The Commission supports

non-violent strategies developed by Aboriginal people to deal with youth issues as well as appropriate programs, as discussed in Part II, developed by government agencies to assist Aboriginal people with parenting skills.³⁰⁴

Proposal 22

That the Western Australian government continue to introduce strategies to educate Aboriginal communities about effective methods of discipline and inform Aboriginal communities of their right under Australian law to use physical correction that is reasonable in the circumstances. In doing this the focus should be on providing advice about the most effective methods of discipline. Aboriginal communities, in particular Elders and other respected members, including members of a community justice group, should be involved in the design and delivery of these education programs.

The Commission understands that some Aboriginal people may be reluctant to participate in programs organised by the Department of Community Development because of the history of its involvement in the removal of Aboriginal children from their families. Therefore, the Commission invites submissions as to which agency would be the most appropriate to conduct parenting programs in conjunction with Aboriginal people.

Invitation to Submit 7

The Commission invites submissions in relation to the most appropriate agency to coordinate education strategies for Aboriginal people about effective methods of parental discipline.

300. Price M, 'Abbott Dances Around a Punishing Question', *The Australian*, 30 June 2005, 1.

301. The National Committee of Violence noted in 1990 that there is much controversy as to whether physical discipline such as spanking is appropriate and whether it should be prohibited by the law. It recommended that the long term aim should be to prohibit physical discipline and in the meantime the focus should be on parent education. See National Committee of Violence, *Violence: Directions for Australia* (Canberra: Australian Institute of Criminology, 1990) <<http://www.aic.gov.au/publications/vda/vda-sec23.html>> 6.

302. See discussion under 'Consent', above p 163.

303. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 41.

304. Katherine Trees mentions the need for the white system to help Aboriginal parents learn to successfully discipline their children. See Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, LRCWA, Project No 94, Background Paper No 6 (November 2004) 25–26. See Part II 'Children and Youth', above pp 20–22 where there is a more detailed discussion of the concerns of Aboriginal people in relation to children and youth. The Commission is aware that the Department of Community Development has developed the 'Best Start' program for Aboriginal families. The program is available in metropolitan, regional and remote locations and deals with issues of health, safety, activities parenting and support for families of children up to five years old. As this program is not available in all locations and not for children over five years the Commission has made a more general proposal. For information on the 'Best Start' program, see <<http://www.community.wa.gov.au>>.

Bail

Aboriginal People and Bail

The Purpose of Bail

When an accused is charged with an offence a decision is made whether he or she should be released in the community on bail or remanded in custody. This question can be determined, prior to the first appearance in court, by an authorised officer. Under the *Bail Act 1982* (WA), an authorised officer is a police officer, justice of the peace or, in the case of a child, an authorised community services officer.¹ If an accused is released on bail then he or she must enter into a bail undertaking which is a promise to appear in court at a particular time and place.²

The purpose of bail is to 'strike a balance' between the need to ensure that people who are charged with offences attend court and to guarantee, as far as possible, that accused people who are presumed innocent are not deprived of their liberty without good reason.³ Another aim of bail is to protect the public from criminal behaviour. Therefore, where an accused is charged with a very serious offence, has a significant record of prior convictions, or is charged with an offence that allegedly occurred while subject to bail, it is more likely that they will be remanded in custody.⁴

Criteria for Determining Release on Bail in Western Australia

The law and procedure in relation to bail in Western Australia is contained in the *Bail Act 1982* (WA) ('the

Act'). An adult has a right to have his or her application for bail considered as soon as practicable; however, there is no right for an adult to be released on bail.⁵ Children, on the other hand, have a qualified right to be released on bail unless there is sufficient reason to withhold bail.⁶ In determining whether an accused should be released on bail it is necessary to consider the various factors set out in the Act. The three most important are ensuring that:

- accused people attend court;
- the public are protected from offending behaviour; and
- there is no obstruction to the course of justice.⁷

When assessing these factors the following matters are to be taken into account:

- the nature and seriousness of the offence and the likely penalty if the accused is convicted;
- the character, previous convictions, antecedents, associations, home environment, background, place of residence and financial position of the accused;
- the history of any previous grants of bail to the accused; and
- the strength of the evidence against the accused.⁸

When deciding if an accused can be released on bail it is necessary to consider whether any conditions could be set that would alleviate concerns that the accused would not appear in court, would be likely to commit further offences, or would in some way interfere with the administration of justice.⁹

1. An authorised community services officer may be the Chief Executive Officer (Justice) or his or her delegate, a registrar of the Children's Court or the superintendent of a detention centre. See *Bail Act 1982* (WA) s 3 and Sch 1, Pt A, cl 1.

2. *Bail Act 1982* (WA) s 28.

3. Victorian Law Reform Commission (VLRC), *Failure to Appear in Court in Response to Bail* (2002) 29.

4. For example, *Bail Act 1982* (WA) Sch 1, Pt C, cl 3A provides that where an accused person has been charged with a serious offence that allegedly was committed while he or she was on bail for another serious offence, then exceptional circumstances must be demonstrated before bail will be considered.

5. *Bail Act 1982* (WA) s 5. The Commission is aware that a review of the *Bail Act 1982* (WA) in 2001 recommended that the legislation should state that adults have a right to bail subject to satisfying the relevant criteria. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice Perth, August 2001) 5.

6. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2(2).

7. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1. It is also necessary to consider whether the accused needs to be held in custody for his or her own protection; whether the prosecutor has put forward grounds for opposing the grant of bail; and whether there are grounds for believing that, if the accused is not kept in custody, the proper conduct of the trial may be prejudiced. A review of the Act in 2001 recommended that the legislation should be simplified and restructured in order that it could be more easily understood. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 4.

8. *Bail Act 1982* (WA) Sch 1, Pt C, cl 3.

9. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

The Problems in Relation to Bail for Aboriginal People

It has been recognised for some time that Aboriginal people encounter problems with respect to bail. In 1991 the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') recommended that governments consider amending bail legislation that unduly restricts the granting of bail to Aboriginal people.¹⁰ Statistics indicate that Aboriginal people are more likely to be refused bail and if granted bail are more likely to be unable to meet the requirements or conditions that have been imposed.¹¹ In August 2005 approximately 35 per cent of adult remand prisoners were Aboriginal.¹² The position in relation to Aboriginal juveniles is of even greater concern. In August 2005, 78 per cent of juveniles in detention on remand were Aboriginal.¹³ A review of the *Bail Act* in 2001, *Review of Best Practice and Innovative Approaches to Bail* (the 2001 Review), observed that the level of over-representation in custody on remand is similar to the level of over-representation of Aboriginal people who are sentenced to imprisonment.¹⁴ The level of over-representation of Aboriginal people in prison, regardless of whether they are sentenced or on remand, is unacceptable. In relation to the high number of Aboriginal people who are in custody on remand it is necessary to consider alternative structures for release on bail for Aboriginal people. The Commission understands that the government is in the process of considering various procedural amendments to the Act.¹⁵ The question whether the Act is generally in need of reform is beyond the terms of reference for this project. The Commission's focus is on issues that specifically affect Aboriginal people and the need for the Act to take into account relevant aspects of Aboriginal customary law.

Sureties

One condition that can be imposed in order to encourage attendance at court is a surety. A surety is a person who enters into an undertaking (promise) that he or she will forfeit a specified sum of money if the accused does not appear in court at the required time.¹⁶ It has been widely acknowledged that many Aboriginal people are unable to obtain surety bail because family members and friends often do not have sufficient assets.¹⁷ In August 2005, 37.5 per cent of all adult remand prisoners who were in custody because they were unable to fulfil bail conditions were Aboriginal.¹⁸ The RCIADIC recommended that governments should closely monitor bail legislation to make sure that the 'entitlement to bail' is being observed in practice.¹⁹ The disproportionate impact of surety conditions upon the ability of Aboriginal people to be released on bail needs to be addressed.



10. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.4.27] Recommendation 91(b).
11. In 2000 almost half of those that were detained in custody after being charged with an offence were Aboriginal. See Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Carlton: The Australian Institute of Judicial Administration, 2002) [6.2].
12. Information received by email from Adrian de Graaf, Senior Statistical Analyst Research and Statistics Unit Community and Juvenile Justice Department of Justice, 30 September 2005.
13. Ibid.
14. Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 46.
15. Some of these proposed amendments are contained in cl 4 and cl 7A of the Bail Amendment Bill 2000 (currently before the Legislative Assembly) and these amendments if implemented will allow bail to be dispensed with for some minor offences.
16. *Bail Act 1982* (WA) s 35. Section 38 provides that a person can only be approved to act as a surety if he or she is 18 years or over and if the value of his or her assets (after deducting liabilities and debts) is more than the amount that could be forfeited. Section 39 provides that when determining whether a person should be approved as a surety, the proximity or connection of the proposed surety to the accused can be taken into account.
17. Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 5; Auditor-General of Western Australia, *Waiting for Justice: Bail and Prisoners on Remand: Performance Examination*, Report No 6 (October 1997) 31; LRCWA, *Bail*, Final Report (March 1979) 5; Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 48. See also Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.16].
18. Information received by e-mail from Adrian de Graaf, Senior Statistical Analyst Research and Statistics Unit Community and Juvenile Justice Department of Justice, 30 September 2005. Approximately 66 per cent of juveniles who were in custody because they could not raise bail were Aboriginal. The Commission is unaware of the extent to which this was due to a requirement for a surety or for a responsible person.
19. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.4.27] Recommendation 89.

The 2001 Review recommended that legislation should provide that any financial condition on bail should only be imposed if other non-financial conditions would not be sufficient to ensure compliance with the bail undertaking.²⁰ The Commission supports this approach but also considers that, in order to achieve fairer access to bail for Aboriginal people, there must be a workable alternative to surety bail.

When assessing possible options it is important to consider the reasons why some Aboriginal people fail to attend court. It has been observed that the failure of Aboriginal people to attend court is not 'because they disregard the obligation to attend', but because they face obstacles to attendance.²¹ Lack of transport is a common reason for failure to appear in court.²² Another reason is that some Aboriginal people with poor literacy skills and those who have language barriers may not fully appreciate the obligation to attend court.²³ It has also been observed that socio-economic disadvantages experienced by many Aboriginal people may cause them to forget to attend court because their lives are in so much turmoil.²⁴ Aboriginal people may also fail to attend court because they experience a general sense of alienation from the criminal justice system.²⁵ Practices within the criminal justice system that encourage the involvement of Aboriginal communities have shown improvements in court attendance rates.²⁶

In a submission to the 2001 Review, the ALS suggested a scheme where suitable Aboriginal people could act as mentors for other Aboriginal people who were on bail. It was proposed that these mentors could provide general support such as assistance in travelling to court.²⁷ Similarly the New South Wales Aboriginal Justice

Advisory Council recommended that there should be a database of respected senior members of local Aboriginal communities who could act as 'guarantors' without the need for a monetary pledge.²⁸

In its 1979 report, *Bail*, the Commission recommended that there should be a provision in the legislation that allows bail to be granted on the basis of an undertaking from a responsible person without the need for any financial security or surety.²⁹ The option for a responsible person to sign an undertaking promising that he or she would ensure that the accused person attends court is only currently available for children.³⁰ The benefit of this option for Aboriginal adults is that it would allow a respected member of the accused's community to provide an assurance to the court that he or she would support the accused while on bail and provide assistance in attending court.

The Commission acknowledged in its 1979 report that the most obvious argument against this approach is that there would be no sanction or penalty for a responsible person who failed in his or her obligation to ensure the attendance of the accused.³¹ While the risk of losing money is supposed to motivate a surety to ensure that the accused complies with the bail undertaking, there would be no consequences for a responsible person if the accused did not attend court. It was concluded, however, that in the case of a respected member of an Aboriginal community, the incentive to guarantee that the accused attended court would be based upon social and cultural duty. If the responsible person failed in their duty they would lose respect from other members of the community.³² The Commission is of the view that the effectiveness of this option could be strengthened by providing that

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20. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 6.
 21. VLRC, *Failure to Appear in Court in Response to Bail* (2002) 20–22. The Commission notes that during its own project on bail in 1977 it was told by the Aboriginal Legal Service of Western Australia (ALS) that despite the high incidence of cases where Aboriginal people fail to attend court, the ALS was not aware of any example where an Aboriginal person deliberately failed to attend in order to avoid his or her court appearance: see LRCWA, *Review of Bail Procedures*, Project No 64, Working Paper (November 1977) 158.
 22. VLRC, *ibid* 22.
 23. *Ibid* 22–23. The fact that some Aboriginal people may have difficulty understanding their bail obligations was recognised by the Commission in 1979. See LRCWA, *Bail*, Final Report (March 1979) 6. Widespread hearing loss in Aboriginal communities, in particular Aboriginal children, may also contribute to a lack of understanding about the criminal justice system including requirements relating to bail. See Howard D, Quinn S, Blokland J & Flynn M, 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3(65) *Aboriginal Law Bulletin* 9.
 24. Information received from the ALS by email dated 4 October 2005. In *Wassa v Norman* (1982) NTR 13, 16 (Forster CJ) the failure of the defendant to report to the police station as required by the bail conditions was a result of forgetfulness rather than any deliberate attempt to abscond. The court noted that the defendant was in fact found 150 meters from the police station. It was held that this should have reduced the amount of money that was forfeited.
 25. See discussion under 'Alienation from the Criminal Justice System', above pp 99–100.
 26. For example, Aboriginal courts in South Australia have shown a marked improvement in the appearance rate of Aboriginal people. For a further discussion see 'Aboriginal Courts – South Australia', above pp 148–49.
 27. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth, Department of Justice, August 2001) Appendix E: ALSWA Submission Extract.
 28. Schwartz M, 'The NSW *Bail Act* and Aboriginal Defendants' (2005) 6(9) *Indigenous Law Bulletin* 6.
 29. LRCWA, *Bail*, Project No 64, Final Report (March 1979) 61. At the time of this report on bail the Commission noted that some magistrates imposed nominal sureties (for example \$1) in order to overcome the problem.
 30. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2.
 31. LRCWA, *Bail*, Project No 64, Final Report (March 1979) 61.
 32. *Ibid*.

One potential role for community justice groups is to supervise and support Aboriginal people while they are on bail.

the authorised officer or judicial officer should determine the suitability of the proposed responsible person. Therefore, the person deciding the suitability of the responsible person would need to be satisfied that the proposed person had sufficient connection with and influence over the accused.

In its examination of community justice mechanisms above, the Commission proposed the establishment of community justice groups.³³ One potential role for community justice groups is to supervise and support Aboriginal people while they are on bail. In some cases it may not be appropriate for an accused to return to a particular community. Members of community justice groups could act as the responsible person where appropriate. Other conditions could also be imposed that would allow an accused to undergo programs that have been developed by the community justice group including programs that aim to strengthen Aboriginal customary law such as cultural or bush trips or family healing centres.³⁴ Of course, bail supervision by community justice groups would be subject to the approval of the relevant community.

A responsible person who signs an undertaking should have the same powers and responsibilities as a surety. In particular, a responsible person should have the power to apprehend the accused or notify police when there are reasonable grounds for believing that the accused has breached a condition of bail or is unlikely to comply with bail.³⁵

The Commission notes that the option of bail being granted to a responsible person for accused adults would apply for both Aboriginal people and non-Aboriginal people.³⁶ For example, it may be appropriate for young adults who still live with their parents or for intellectually disabled people who may not fully understand their obligations under bail.

Proposal 23

That Clause 1 of Part D to the Schedule of the *Bail Act 1982* (WA) be amended to include, as a possible condition of bail,

- (f) that before the release of the accused on bail a responsible person undertakes in writing in the prescribed form to ensure that the accused complies with any requirement of his bail undertaking. The authorised officer or judicial officer must be satisfied that the proposed responsible person is suitable.

The rationale behind a surety undertaking is that when a surety is liable to lose a significant amount of money if the accused does not appear in court, then the surety will do everything possible to make certain that the accused attends court when required. The amount which a surety is liable to lose, relative to his or her financial means, is therefore relevant and should be taken into account. It has been suggested in New South Wales that the amount could be set as a proportion of the surety's income.³⁷ In Western Australia, a police officer, judicial officer or other authorised officer has discretion in setting an amount for a surety. The Commission considers that this discretion should be retained; however, it should be subject to a requirement to consider the financial means of the proposed surety.

Proposal 24

That the *Bail Act 1982* (WA) be amended to provide that when setting the amount of a surety undertaking the financial means of any proposed surety should be taken into account.

33. See discussion under 'The Commission's proposal for Community Justice Groups', above pp 133–41.

34. Under cl 2(1), Pt D, Sch 1 of the *Bail Act 1982* (WA) the authorised officer or judicial officer can impose conditions on the accused as to his or her conduct while on bail or in relation to where the accused lives in order to ensure that he or she attends court and does not commit any offence or endanger any person or property. In Geraldton the Commission was told that magistrates in the region used the *Bail Act 1982* (WA) to 'send Aboriginal people on bush programs for alcohol related problems': see LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 14.

35. *Bail Act 1982* (WA) s 46.

36. LRCWA, *Bail*, Project No 64, Final Report (March 1979) 62.

37. Aboriginal Justice Advisory Council, *Aboriginal People and Bail: Courts in NSW* (2001): see <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports>> 17. The Commission notes that during its consultations in Mirrabooka it was said that bail should be granted according to the means of the accused: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 14.

The requirement for a responsible person for juveniles

The RCIADIC observed that Aboriginal children face additional obstacles in being released on bail.³⁸ Although children have a greater right to bail than adults, in practice this is not always the case. The Act provides that a child under the age of 17 years can only be released on bail if a responsible person signs an undertaking.³⁹ In the 2001 Review of the Act, it was observed that this requirement can discriminate against children.⁴⁰ Because a child may not be able to meet this requirement he or she may be remanded in custody. This is inconsistent with international law standards⁴¹ and with the principle contained in s 7(h) of the *Young Offenders Act 1994* (WA) that detention of children, both before and after conviction, should only be used as a last resort. In its submission to the 2001 Review, the ALS advised that it had represented numerous Aboriginal children who had spent two to three nights in custody for minor offences, such as disorderly conduct and possession of cannabis, because no responsible adult was available.⁴² Aboriginal children may not be able to meet the requirement for a responsible person to sign bail when they are arrested some distance from their home and family or because of socio-economic problems such as lack of transport. The Commission supports the recommendation of the 2001 Review that police officers should make greater use of notices to attend court instead of arrest and the subsequent need to release on bail.⁴³

In 1997 the ALRC commented on specific problems encountered by children from rural and remote communities.⁴⁴ In Western Australia any child who is detained in custody must be brought to Perth as there are currently no juvenile detention facilities outside the

metropolitan area.⁴⁵ If bail is initially refused by a police officer, a justice of the peace or authorised community services officer, the child will be remanded to Perth until the next available Children's Court date. Adults from remote locations are also disadvantaged by a decision to refuse bail: they will be taken from their community to the nearest custodial facility. The 2001 Review recommended that when an accused is dissatisfied with a bail decision they should be entitled to apply by telephone to a magistrate.⁴⁶ The Commission supports this recommendation. It would benefit both Aboriginal adults and children from remote and rural locations.⁴⁷ It is particularly important to avoid, where possible, children being taken long distances to Perth in police custody.

Proposal 25

That the *Bail Act 1982* (WA) be amended to provide that where an adult or juvenile accused has been refused bail or is unable to meet the conditions of bail that have been set by an authorised police officer, justice of the peace or authorised community services officer, the accused is entitled to apply to a magistrate for bail by telephone application if he or she could not otherwise be brought before a court by 4.00 pm the following day.

The supervised bail program run by the Department of Justice is designed to alleviate, where possible, injustice for those children who are unable to locate a responsible person. Where no responsible person can be located a supervised bail co-coordinator can act as the responsible person and the juvenile will reside at an approved location, usually a hostel.⁴⁸ In regional and remote

38. RCIADIC, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* (1991) [4.1.4.7].

39. *Bail Act 1982* (WA) Sch 1, Pt C, cl 2(2). It is possible for a 17-year-old to be released on his or her own personal undertaking provided that he or she is of sufficient maturity to live independently.

40. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 43.

41. Article 37(b) of the *Convention on the Rights of the Child*, which came into force in Australia in 1991, provides that the arrest, detention or imprisonment of children should only be used as a measure of last resort.

42. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 42.

43. Ibid 43. The Commission separately considers the role of police: see 'Attending court without arrest', below p 243.

44. ALRC, *Seen and Heard: Priority for children in the legal process*, Project No 84, Final Report (1997) [18.166].

45. The Commission understands that the government has committed to building juvenile remand institutions at Geraldton and Kalgoorlie although, as observed by the Inspector of Custodial Services, there is a more pressing need in the Kimberly and Pilbara: see Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (August 2005), viii.

46. See Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) 32, 44. An example in South Australia was referred to where the entitlement to apply to a magistrate arises when the accused could not be brought before a court by 4pm the following day. The ability to apply to a magistrate for a review of a decision made by a police officer, justice of the peace or authorised community services officer would address the criticism that justices of the peace are unaccountable for their decisions in relation to bail. In particular, it has been suggested that when justices of the peace make a decision about the suitability of a proposed surety, unnecessary criteria are applied to the detriment of Aboriginal people. See LRCWA, *Review of the Criminal and Civil Justice System*, Project No 92 (1999) Submissions Summary, 147–48.

47. It would also be relevant for accused people who are refused bail or have had bail set with conditions that are unable to be met during the weekend.

48. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 7 (December 2004) 100.

locations the supervised bail program has operated in conjunction with Aboriginal communities. There have been three regional Department-run programs since 2000, although at the start of 2005 only the bail program at Yandeyarra community was in operation.⁴⁹ Initiatives such as these have the potential to prevent young Aboriginal people from cultural and community dislocation. It has been observed that when Aboriginal children are placed in these facilities they are taught important life skills including aspects of Aboriginal culture.⁵⁰ The Department of Justice indicates that there are ongoing discussions with Aboriginal communities to find other suitable locations.⁵¹ The RCIADIC recommended that strategies should be introduced to reduce the rate that Aboriginal children are separated from their families by juvenile detention.⁵² Aboriginal people consulted by the Commission for this project indicated support for community-based bail facilities for children.⁵³

As discussed above the Commission's proposal for the establishment of community justice groups anticipates that they might provide culturally appropriate options for supervision while on bail.⁵⁴ The legislative requirement that a child must be bailed to a responsible person is broad enough to allow a member of a community justice group to act as a responsible person. In addition, the Commission supports the expansion of the Supervised Bail Program in rural and remote locations. The Commission acknowledges that the Department of Justice needs to be satisfied that there will be adequate and safe supervision of juveniles who are placed in community bail programs.⁵⁵ To this end, community justice groups will require sufficient resources and assistance from appropriate government departments to build capacity to provide programs for young people that address safety issues.

Proposal 26

That the Department of Justice continue to develop, in partnership with Aboriginal communities, non-custodial bail facilities for Aboriginal children in remote and rural locations. In developing these facilities the Department of Justice should work in conjunction with any local community justice group.

Onerous conditions

Bail can be granted on various conditions that are designed to ensure that the accused attends court and refrains from criminal activity. Commonly imposed conditions include a requirement to regularly report to a police station or a curfew prohibiting the accused from leaving their place of residence during specified hours. During its consultations the Commission heard complaints by Aboriginal people that onerous and 'outrageous' conditions were sometimes imposed.⁵⁶ Research has shown that these types of conditions do little to improve the attendance rate when an accused is only subject to a personal bail undertaking.⁵⁷ The proposal for bail to be granted to a responsible person should be utilised in preference to conditions that are unduly restrictive and not necessarily effective. For example, if an accused person was released on bail subject to a condition that a responsible adult entered into an undertaking, this would allow an Aboriginal Elder from the accused's community to undertake to personally guarantee that the accused would attend court. If transport was an issue, a condition to report to a police station three times a week would make no difference to the ability of the accused to attend court. On the other hand, a promise by a respected member

49. See Department of Justice, *2005 Handbook* (2005) 40; Department of Justice, *Annual Report on Operations* (2003/2004) 99. The Banana Well program outside Broome and the Bell Springs program at Kununurra were withdrawn in 2004. In their background paper, Neil Morgan and Joanne Motteram state that the Bell Springs program was closed 'due to on-going concerns regarding the level of supervision': see Morgan & Motteram, *ibid* 100.
50. Polk K, Alder C, Muller D & Rechtman K, *Early Intervention: Diversion and Youth Conferencing: A national profile and review of current approaches to directing juveniles from the criminal justice system* (Canberra: Attorney-General's Department, December 2003) 64.
51. Department of Justice, *2005 Handbook* (2005) 40. It was acknowledged that the supervised bail program is difficult to arrange in regional and remote areas: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [11.44].
52. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [14.1] Recommendation 62.
53. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 6 & 10; *Pilbara*, 6–11 April 2003, 15; *Geraldton*, 26–27 May 2003, 14.
54. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.
55. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, Law LRCWA, Project No 94, Background Paper No 7 (December 2004) 101.
56. LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 5 where it was noted that bail conditions can be too onerous; *Broome*, 17–19 August 2003, 25 where it was said that police impose curfews on young people and then come to the house in the middle of the night to check on them; *Wiluna*, 27 August 2003, 24 where it was stated that curfews are considered a punishment by some Aboriginal people.
57. Auditor-General of Western Australia, *Waiting for Justice: Bail and prisoners on remand: Performance examination*, Report No 6 (October 1997) 12. This research suggested that there was some improvement in the rate of attendance where the bail conditions were imposed in addition to a surety undertaking or a personal undertaking with an agreement that the accused forfeit a sum of money. However, where the accused signs an undertaking with no amount of money then additional conditions, such as reporting to a police station, did not significantly improve the rate of attendance.

of the accused's community to drive the accused to court would be far more effective.

Personal circumstances of the accused

The requirement to consider the 'character, previous convictions, antecedents, associations, home environment, background, place of residence, and financial position' of the accused has the potential to disadvantage some Aboriginal people applying for bail. Aboriginal people experience high rates of homelessness and overcrowding in public housing.⁵⁸ Similarly, Aboriginal people experience a higher incidence of unemployment than non-Aboriginal people.⁵⁹

In 2001 the Aboriginal Justice Advisory Council argued that courts in New South Wales did not adequately take into account cultural ties to a community. Instead, the focus was on Western concepts such as employment, home ownership or long-term residence.⁶⁰ The *Bail Act 1978* (NSW) was amended in 2002 to provide that when assessing the background and community ties of Aboriginal and Torres Strait Islander people regard should be had to the person's connections to 'extended family and kinship and other traditional ties to place'.⁶¹ The ALRC recommended, more broadly, that a court or other body deciding bail may take into account, as far as relevant, the 'customary laws of an Aboriginal community to which the defendant or a victim of the offence belongs'.⁶²

The *Bail Act 1980* (Qld) provides that when considering bail the court or the police officer shall have regard to, if the defendant is an Aboriginal person or a Torres Strait Islander, any submissions made by a representative of the community justice group in the defendant's community including, for example:

- (i) The defendant's relationship to the defendant's community; or
- (ii) Any cultural consideration; or
- (iii) Any considerations relating to programs and services for offenders in which the community justice group participates.⁶³

The *Bail Act 1982* (WA) allows an authorised officer or judicial officer to take into account any matters which he or she considers are relevant when deciding if an accused person should be released on bail.⁶⁴ Although the Act is silent on Aboriginal customary law and other cultural issues, there is no reason why these matters could not be taken into account if relevant to the question of bail. The Commission is concerned, however, that unless authorised officers and judicial officers are directed to consider these issues practices will remain varied and likely to disadvantage many Aboriginal people. Injustice can occur if individual police, judicial officers or legal representatives are not fully aware of Aboriginal customary law and cultural issues. Therefore, it is proposed that the Act be amended to provide that any relevant matters of Aboriginal customary law or other cultural issues are to be taken into account when determining bail. The Commission



58. For a full discussion of the problems faced by Aboriginal people in relation to living conditions, see Part II 'Housing and Living Conditions', above pp 38–42. Overcrowding also makes it difficult for some Aboriginal people to be released on home detention bail because the proposed residence may not be considered suitable: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [6.2.2].

59. See discussion under Part II 'Employment', above pp 36–37.

60. Aboriginal Justice Advisory Council, *Aboriginal People and Bail: Courts in NSW* (2001) <<http://www.lawlink.nsw.gov.au/ajac.nsf/pages/reports>> 11.

61. *Bail Act 1978* (NSW) s 32(1)(a)(ia). In New South Wales it is also provided that a court or police officer is to take into account any special needs that arise because the accused is Aboriginal see s 32(1)(b)(v).

62. ALRC, *Draft Aboriginal Customary Laws (Recognition) Bill 1986*, cl 20.

63. *Bail Act 1980* (Qld) s 16(2)(e). This provision applies to both adults and juveniles. In Queensland a court has set bail on condition that the accused attend the community justice group as and when directed to do so by the co-ordinator of the community justice group: see *Clumpoint v Director of Public Prosecutions (Qld)* [2005] QCA 43 [2].

64. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1.

Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court.

prefers the broader approach as suggested by the ALRC; limiting the relevance of customary law and cultural matters to an assessment of the accused's personal circumstances would be unduly restrictive. For example, Aboriginal customary law and other cultural issues may be relevant as an explanation for past failure to attend court. Further, innovative conditions designed to reduce the likelihood of failing to attend court and prevent further offending could be based upon methods for resolving disputes under Aboriginal customary law and the involvement of traditional authority structures such as Elders.⁶⁵

Proposal 27

That Clause 3 of Part C in Schedule 1 of the *Bail Act 1982* (WA) be amended to provide that the judicial officer or authorised officer shall have regard to:

- (e) Where the accused is an Aboriginal person, any cultural or Aboriginal customary law issues that are relevant to bail.

Without limiting the manner by which information about cultural or Aboriginal customary law issues can be received by an authorised officer or judicial officer, the authorised officer or judicial officer shall take into account any submissions received from a representative of a community justice group from the accused's community.

Aboriginal Customary Law and Bail

Funeral Attendance

In Western Australia it is an offence to fail to attend court, without reasonable cause, at the time and place specified. If an accused has been unable to attend court and fails to notify the court of the reason for non-attendance and subsequently attend court as soon as practicable, he or she will also commit an offence.⁶⁶ Given the importance of Aboriginal customary law to many Aboriginal people, cultural and customary law obligations may take precedence for them over the requirement to attend court. The RCIADIC noted that one factor, 'which in some areas can create a great dilemma for Aboriginal defendants, is a strongly felt obligation associated with the death of a family member'.⁶⁷ During its consultations the Commission received extensive comments from Aboriginal people about the importance of attending funerals.⁶⁸ In Carnarvon it was said that there was no choice:

If your face is missing, it will be noticed. People's attitudes to you change if you do not attend.⁶⁹

During the Pilbara consultations it was stated that:

You will break Aboriginal law if you don't go to a funeral.⁷⁰

While attendance at funerals is obviously important in all cultures, kinship and cultural obligations under

65. For example, an accused could be released on bail to comply with the lawful directions of a community justice group and required by the community justice group to attend a family healing centre or spend a period of time at an outstation. For detailed discussion of community justice groups, see 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

66. *Bail Act 1982* (WA) ss 51(1)–(2). The penalty for this offence is a fine up to \$10,000 or up to three years' imprisonment. It is also an offence to fail to comply with certain conditions of bail such as a condition not to contact a particular witness or the victim: see s 51(2a). In all jurisdictions except the Northern Territory it is an offence to fail to answer bail without a reasonable excuse. See VLRC, *Failure to Appear in Court in Response to Bail* (2002) 25. In the Northern Territory if a person fails to appear in court or otherwise fails to comply with the bail conditions he or she is liable to arrest and when he or she is brought before a court the issue of bail will be reconsidered. If the accused had agreed to forfeit an amount of money if he or she failed to attend court then this amount of money may be forfeited. See *Bail Act 1982* (NT) ss 38–40. The only case known to the Commission that has considered what constitutes a 'reasonable cause' is *Bradshaw v Moylan* (Unreported, Supreme Court of Western Australia, No 1178-80 of 1993, Nicholson J, 25 February 1994). In this case an Aboriginal accused failed to attend court on the required day because it was a public holiday. Nevertheless, because it was a regional location the court still sat on that day with one justice of the peace. Nicholson J held that there was an arguable defence to the charge of breach of bail.

67. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.4.27].

68. The importance of funerals in traditional Aboriginal societies is discussed under Part VI 'Funerary Practices', below pp 310–17.

69. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.

70. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 13.

customary law may require Aboriginal people to attend funerals even where it is necessary to travel long distances and the deceased person would be considered a distant relative in a Western context.⁷¹ The Commission is not aware how often Aboriginal people are charged with breaching bail if they have failed to appear in court because of their funerary customs. It is impossible to know the extent to which police officers exercise their discretion in this situation.⁷²

The question whether attendance at a funeral should constitute a defence to a charge of breaching bail is complicated by the obligation under the Act that an accused who cannot attend court must notify the court and appear as soon as practicable. The ALS, in its submission to 2001 Review, stated that Aboriginal people may not advise courts when they are required to attend a funeral because of 'lack of access to phones, fear that they will not be allowed to attend the funeral and a lack of understanding of the need to advise the court in advance'.⁷³ According to the ALS, failure to appear in court due to funerary customs is common amongst Aboriginal people. While it appears that funeral attendance has not been argued as a defence for a charge, it is often accepted by magistrates when legal representatives advise the court prior to a warrant being issued for non-attendance. The ALS suggests that attendance at funerals has not been argued as a defence to a charge of breaching bail because in most cases the accused has not complied with the requirement to notify the court and appear as soon as practicable.⁷⁴ This is an issue that needs to be addressed through improved communication when Aboriginal people enter into their bail undertaking.⁷⁵ Although people are provided with formal notices under the Act these documents merely repeat legislative requirements.⁷⁶ The Commission is of the view that members of community justice groups could support Aboriginal people who are on bail by providing assistance in notifying the court or, alternatively, the ALS when

an accused person is unable to attend court due to a funeral or other associated cultural ceremonies.

Proposal 28

That bail forms and notices (including the bail renewal notice handed to an accused after each court appearance) be amended to include culturally appropriate educational material in relation to the obligations of bail including what an accused person can do if he or she is unable to attend court for a legitimate reason.

That the rewording of these forms and notices should be undertaken with the assistance of Aboriginal communities.

There may be circumstances where the only reason that an accused has not notified the court or subsequently appeared in court is because he or she is grieving or involved in cultural obligations associated with a funeral. When an Aboriginal person has failed to attend court because he or she was attending a funeral, police officers and courts should take into account the person's customary law obligations associated with the funeral when deciding if there was a reasonable cause.

Traditional Punishment and Bail

The Commission's consultations indicated that many Aboriginal people were concerned that when an Aboriginal person was charged with an offence under Australian law (and had also breached Aboriginal customary law) the person was taken away by police before there was an opportunity for traditional punishment to take place:

If someone contravenes our law and white law, and is not punished first by Aboriginal law, then the matter festers, with members of the offender's family being held responsible.⁷⁷

71. See discussion under Part VI 'Funerary Practices', below pp 310–17.

72. The Commission accepts that there are probably cases that have come before a magistrate but as these transcripts are not publicly available it is difficult to know how often a charge of breach of bail has been successfully defended. One possible reason for that scarcity of case law in relation to breach of bail is that in 1997 it was found that over 50 per cent of people that failed to attend court were not in fact charged with breach of bail. One reason suggested for this is that police may have accepted the explanations given to them. See Auditor-General of Western Australia, *Waiting for Justice: Bail and prisoners on remand: Performance examination*, Report No 6 (October 1997) 14.

73. Stamfords Consultants, *Review of Best Practice and Innovative Approaches to Bail* (Perth: Department of Justice, August 2001) Appendix E: ALSWA Submission Extract.

74. Information received by email from the ALS, 4 October 2005. The Commission notes that cl 27 of the Bail Amendment Bill 2000, if passed, will remove the requirement to notify the registrar of the court of the reason for the failure to attend. However the obligation to subsequently appear as soon as practicable will remain.

75. The Commission acknowledges that individual staff at the ALS endeavour to advise their clients of their obligations under bail. However, not all Aboriginal accused are represented by the ALS and some are not represented at all. The Commission notes that the Mahoney Inquiry observed that many accused do not understand the bail system: see Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [16.23].

76. See *Bail Regulations 1988* (WA) Forms 6, 7, Sch 1.

77. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.

Where a matter cannot be resolved according to Aboriginal customary law there is often disharmony in the community.⁷⁸ If the offender is not available to undergo traditional punishment, members of the offender's family may instead be liable to face punishment.⁷⁹ The preferable position according to many Aboriginal people is for the offender to face traditional punishment prior to being arrested and dealt with by Australian law.⁸⁰

The central issue is whether an accused person's wish to undergo traditional punishment can be legitimately taken into account when considering bail. Whether police officers should allow traditional punishment to take place before the accused is arrested or taken into police custody is discussed below in the section on police.⁸¹ At this stage the discussion is concerned with bail and therefore addresses the question whether an accused person can and should be released for the purpose of traditional punishment after arrest.

The relevant law in Western Australia

A relevant criterion in determining whether an accused person can be released on bail for the purpose of traditional punishment is whether the accused needs to be held in custody for his or her own protection.⁸² (Of course, all other relevant factors under the Act must also be taken into account.) The Commission acknowledges that there may be many cases that have come before magistrates where an accused person has applied for bail for the purpose of undergoing traditional punishment, whether this purpose has been made known to the court or not. In *Fitzroy Crossing* it was said that the practice of magistrates is varied – sometimes the accused will be released on bail for the purpose of customary law punishment and other times not.⁸³

Some Western Australian judicial precedent for this issue can be found in applications for bail that have

come before the Supreme Court in cases of wilful murder or murder. When an Aboriginal person has been involved in the death of another Aboriginal person traditional punishment will usually follow. Applications for bail based upon traditional punishment have been made in cases of wilful murder or murder because for extremely serious offences it is necessary to show exceptional circumstances in order to be released on bail.⁸⁴ In cases where an accused would otherwise be likely to be granted bail it is unlikely that traditional punishment would be relied upon as the basis for the application.

In *Gable v The Queen*⁸⁵ the accused (who was charged with wilful murder) applied for bail in order that he could be speared. Elders testified that if the accused did not present himself for traditional punishment his brothers or sisters would face punishment instead. The evidence indicated that the accused would be speared in the thigh and it would be up to the family of the deceased as to whether the accused would be 'destroyed'. The Supreme Court considered that the spearing in this case would amount to grievous bodily harm and was therefore unlawful under Australian law. It was stated that a court may 'recognise tribal punishment as inevitable, but it cannot sanction or condone such punishment'.⁸⁶ The court also accepted the Crown's submission that if the accused was released on bail he might be speared in such a manner that could lead to his death and accordingly the court was required by the Act to keep the accused in custody for his own protection.⁸⁷

In contrast, in *Unchango v The Queen*⁸⁸ the Supreme Court released the accused on bail for a charge of murder. In that case the court was satisfied that exceptional circumstances existed because the accused claimed that the deceased was stabbed in self-defence during the course of a sexual assault. When considering whether the accused needed to be kept in custody

78. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 3–4; *Pilbara*, 6–11 April 2003, 12; *Albany*, 18 November 2003, 16.

79. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 4; *Cosmo Newbery*, 6 March 2003, 19; *Pilbara*, 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 14; *Wiluna*, 27 August 2003, 22; *Wuggubun*, 9–10 September 2003, 36.

80. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 3–4; *Pilbara*, 6–11 April 2003, 8, 12; *Casuarina Prison*, 23 July 2003, 3; *Carnarvon*, 30–31 July 2003, 4; *Wuggubun*, 9–10 September 2003, 36.

81. See 'The Police and Aboriginal Customary Law', below pp 236–39.

82. *Bail Act 1982* (WA) Sch 1, Pt C, cl 1(b). In New South Wales legislation expressly states that the court or authorised officer that is deciding whether to release an accused on bail should consider any special needs of an accused arising from his or her Aboriginality. On the face of it this could include the need to submit to traditional punishment. Because it is also necessary to consider whether the accused is in need of physical protection it would still be difficult for a court to release an Aboriginal person for the purpose of physical punishment. See *Bail Act 1978* (NSW) s 32(1)(b)(v).

83. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42.

84. *Goldfinch v State of Western Australia* [2004] WASCA 218, [51] (Roberts-Smith J).

85. Unreported, Supreme Court of Western Australia, No MC S 47 of 1993, 3 September 1993.

86. *Ibid* 7 (Commissioner Yeats).

87. *Ibid*.

88. [1998] WASC 186.

for her own protection the court took into account assurances from staff at the cultural centre (where it was proposed that the accused would reside) that the accused would not be subject to any traditional punishment while she remained at the centre.⁸⁹

Similar arguments based on traditional punishment have been raised in the Northern Territory. There the legislation states that in considering whether to release an accused on bail the court or police officer must decide whether the accused is 'in danger of physical injury or in need of physical protection'.⁹⁰ Although the Northern Territory Supreme Court has allowed the release of an Aboriginal person for the purpose of traditional punishment,⁹¹ recent cases suggest that, where the proposed punishment would breach the criminal law, bail will either be refused or subject to conditions that are designed to prevent traditional punishment from taking place.⁹² In 2004 in the case *In the Matter of an Application by Anthony*⁹³ the accused was charged with the manslaughter of his wife. The accused applied for bail on the basis that he wished to be released to undergo traditional punishment. It was submitted that the accused consented to the punishment and that he believed if he did not present himself he may be 'cursed by Aboriginal magic which might kill him while he was in gaol' and that his family may suffer punishment.⁹⁴ Martin CJ held that a court could not make an order that would facilitate the 'unlawful infliction of traditional punishment'.⁹⁵ He stated, however, that there could be circumstances where a court could grant bail to an accused on terms that would permit traditional punishment to take place:

It is necessarily impossible to attempt to define the circumstances in which such a course would be permissible or appropriate, but I have in mind as an

example minor physical punishment to which the offender is capable in law of consenting. If the court was satisfied that for cultural reasons such lawful punishment would be of benefit to the applicant, the victim, the victim's family and the particular community, in my view it would be permissible for a court to structure orders in a way that would allow for the opportunity for such punishment to be inflicted. If the applicant and all others involved sought such a course and it was clear that such a course would both recognise traditional law and benefit all concerned, the court should be reluctant to deny that course in a paternalistic approach based on moral values or views which are in conflict with the traditional law of the particular applicant and the applicant's community.⁹⁶

The evidence indicated that the accused would be speared in each leg about four times and receive blows with a nulla nulla to his back. Martin CJ held that there was a significant risk that the punishment would result in grievous bodily harm (rather than bodily harm) and therefore the accused could not lawfully consent. This view was partly based on the fact that the people who were going to administer the punishment were inexperienced and there existed the risk that an artery could be severed.⁹⁷ After taking other factors into consideration the accused was released on bail. Martin CJ was of the view that it would not be appropriate to remand the accused in custody solely for the purpose of protecting him from voluntary participation in traditional punishment.⁹⁸ The court imposed as a condition of bail that the accused not attend the particular community where the traditional punishment would take place.⁹⁹ Within a couple of months the accused was arrested in hospital (where he was receiving treatment for leg injuries and a broken arm caused by the traditional punishment) for breaching his bail conditions by attending that community.¹⁰⁰

89. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 6.

90. *Bail Act 1982* (NT) ss 24 (1)(b)(iii)–(iv).

91. *R v Jungarai* (1981) 9 NTR 30. For a fuller discussion of this case, see Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 6.

92. In *Barnes v The Queen* (1997) 96 A Crim R 593 (Mildren J) bail was refused to an Aboriginal man who wished to be released for traditional punishment. The court held that given the legislative provision, that requires a court to consider whether the defendant needs to be held in custody for his or her own protection, the defendant could not be released for punishment that would constitute a criminal offence in the Northern Territory. In *Ebatarinja v The Queen* [2000] NTSC 26 at [17] Mildren J confirmed that a court cannot release a defendant on bail if doing so would 'facilitate an unlawful act'. In this case the defendant was released on bail because the court held that there was no evidence presented to the court about the details of the proposed punishment and therefore there was no evidence that the traditional punishment would constitute an unlawful act.

93. [2004] NTSC 5 (Martin CJ).

94. *Ibid* [16].

95. *Ibid* [22].

96. *Ibid* [26].

97. *Ibid* [27]–[35].

98. *Ibid* [37]–[39].

99. *Ibid* [44].

100. 'Man Speared and Arrested in Tribal Punishment Case', *The Sydney Morning Herald*, 24 March 2005 <<http://www.smh.com.au/articles/2004/03/24/1079939697533.html>>. The Commission notes that legislation was introduced by a private member into Parliament in the Northern Territory with the aim of preventing a court from releasing an Aboriginal person where the court knows that he or she will be subject to traditional punishment. The legislation was defeated because it was not supported by the Northern Territory government. The Attorney-General, Dr Toyne, observed that the

The Commission's view

In his background paper for this project, Philip Vincent recommended that the Act should be amended to include, as a criterion for the granting of bail, that the Aboriginal community's wishes for the accused person to return to the community for the purpose of customary punishment be considered.¹⁰¹ The Law Society of Western Australia in a submission for this project outlined a series of pre-conditions that should be met before an Aboriginal accused person could be released on bail for the purpose of undergoing traditional punishment.¹⁰² These included that:

- the accused wishes to undergo traditional punishment;
- the court is satisfied that traditional punishment was sanctioned by the accused's community of origin;
- the court is satisfied that there is adequate medical treatment available for the accused and that there will be police present;
- the court is satisfied that the accused will face traditional punishment eventually upon release from custody; and
- the court is satisfied that if the accused is not released for traditional punishment members of the accused's family will be at risk of punishment.

The Law Society of Western Australia did acknowledge that the lawfulness or otherwise of traditional punishment must be addressed before any amendments could be made to the Act. The Commission agrees that whether a proposed punishment is lawful is central to the question whether an Aboriginal person can be released on bail for the purpose of traditional punishment or with knowledge that traditional punishment will take place. A detailed discussion of this complex issue can be found above in the section on consent.¹⁰³

In its 1986 report on Aboriginal customary laws the ALRC concluded that:



A court should not prevent a defendant from returning to his or her own community (with the possibility or even likelihood that the defendant will face some form of traditional punishment) if the defendant applies for bail, and if the other conditions for release on bail are met.¹⁰⁴

When applying for bail, if an accused relies upon his or her desire to undergo traditional or customary law punishment, the outcome will be determined by the lawfulness of the proposed punishment. It is the Commission's view that if the punishment is unlawful, a court cannot release the offender for the purpose of undergoing that punishment. If in all other respects the accused should be granted bail, the court will be obliged to impose conditions to protect the accused from any physical injury. Where the proposed punishment under Aboriginal customary law is not unlawful and the accused wishes to be released for the punishment, the Commission does not consider that it is necessary to impose conditions upon the manner in which the punishment will take place. The proposal discussed above, that Aboriginal customary law and other cultural matters should generally be included in the Act as a relevant factor, will enable Aboriginal customary law punishments that are not unlawful, such as community shaming, compensation or symbolic spearing to be considered when determining bail.

current law in the Northern Territory did not allow a court to release a person for the purpose of traditional punishment and despite one case example (before a magistrate) where a person was so released, he did not consider that there was any need for reform. See Northern Territory, *Hansard*, Parliamentary Record No 16, 26 November 2003.

101. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 34. Hal Jackson has also suggested that despite the difficulties it may be appropriate to grant bail to a traditional Aboriginal person for the purpose of enabling customary punishment prior to being sentenced under Australian law: see Jackson HH, 'Can the Judiciary and Lawyers Properly Understand Aboriginal Concerns' (1997) 24(4) *Brief* 12, 15.

102. Law Society of Western Australia, Submissions in relation to Background Paper No 1, 9 December 2004, 6.

103. See discussion under 'Consent', above p 163–72.

104. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [506].

Sentencing

Aboriginality and Sentencing

General Sentencing Principles

Sentencing is the stage of the criminal justice process where a court determines the appropriate penalty for an offence. In Australia sentences are determined by a judicial officer (as distinct from a jury). A judicial officer is required by law to take into account all relevant factors when sentencing. Each case is decided on an individual basis because the circumstances of each offence and each offender are different. When determining the appropriate sentence a court must weigh up all relevant factors as well as various sentencing objectives. The main objectives are punishment, deterrence, incapacitation, denouncement and rehabilitation.

Punishment encompasses the idea that offenders should receive their 'just deserts'.¹ Deterrence is aimed at discouraging the offender as well as other potential offenders from committing offences in the future.² When necessary, courts will impose a sentence with the purpose of incapacitating an offender (generally only for a limited period of time) so that he or she is incapable of committing further offences.³ Denouncement reflects the educative role of the criminal law by indicating to the offender and others, through the imposition of a penalty, that certain behaviour is unacceptable.⁴ Rehabilitation aims to reform an offender in order that he or she no longer poses a risk to the community.⁵

Underlying these objectives are the overall aims to reduce crime and protect the community.⁶ Sentencing

principles require that any penalty should be proportionate to the seriousness of the offence, which is determined by taking into account the harm caused and the culpability of the offender.⁷ It has been observed that the general community usually favours punishment and deterrence over rehabilitation.⁸ The purpose of rehabilitation is often misunderstood. It has been said that:

It is fallacious to regard the rehabilitation of an individual offender as a consideration separate and apart from, and somehow inimical to, the protection of the public. The two things are intrinsically connected. The criminal justice system aims to rehabilitate offenders (particularly young offenders) because rehabilitation removes the danger to the public from one of its (previously) errant members.⁹

In Western Australia a number of sentencing principles are contained in the *Sentencing Act 1995* (WA) ('the Act'). For children relevant principles are contained in the *Young Offenders Act 1994* (WA). The principle that punishment must be proportionate is reflected in s 6(1) of the Act:

A sentence imposed on an offender must be commensurate with the seriousness of the offence.

Section 6(2) of the Act provides that the seriousness of an offence is to be determined by taking into account

- (a) the statutory penalty for the offence;
- (b) the circumstances of the commission of the offence, including the vulnerability of the any victim of the offence;
- (c) any aggravating factors; and
- (d) any mitigating factors.¹⁰

1. Clarkson C & Keating H, *Criminal Law: Text and materials* (London: Sweet and Maxwell, 1994) 24.

2. Von Hirsch A & Ashworth A, *Principled Sentencing: Readings on theory and policy* (Oxford: Hart Publishing, 1998) 44.

3. Clarkson C & Keating H, *Criminal Law: Text and materials* (London: Sweet and Maxwell, 1994) 45. Imprisonment incapacitates an offender for the duration of the prison term.

4. Ibid 32.

5. Von Hirsch A & Ashworth A, *Principled Sentencing: Readings on theory and policy* (Oxford: Hart Publishing, 1998) 1.

6. New South Wales Law Reform Commission (NSWLRC), *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 29.

7. Ibid 29–30.

8. Ibid 52.

9. *B (A Child) v The Queen* (1995) 82 A Crim R 234, 244.

10. Aggravating factors are defined in s 7 of the *Sentencing Act 1995* (WA) as factors which 'increase the culpability of the offender' but do not include the fact that the offender has pleaded not guilty, has a criminal record or a previous sentence has not achieved the purpose for which it was imposed. Mitigating factors are defined in s 8 as factors which 'decrease the culpability of the offender or decrease the extent to which the offender should be punished'.

In comparison to Western Australia, sentencing legislation in most other Australian jurisdictions includes comprehensive sentencing principles and a full list of relevant sentencing factors.¹¹ In 2000 the New South Wales Law Reform Commission observed that there had been a recent trend to include, for the purpose of guidance, the factors that should be taken into account in sentencing. Western Australia was noted as an exception to this general trend.¹² Unlike other jurisdictions Western Australia does not include as a general sentencing principle the purposes of deterrence, denouncement or rehabilitation. Specific factors—such as those relating to the offence, the response to the offence by the offender, the offender's personal circumstances and facts relating to the victim—are not set out in the Western Australian legislation.

The Relevance of Aboriginality to Sentencing

Sentencing principles apply equally irrespective of the cultural background of the offender. In other words an Aboriginal person cannot be sentenced more leniently or more harshly just because he or she is Aboriginal.¹³ This general proposition does not mean that the individual characteristics of a particular offender (including matters associated with his or her cultural background) cannot be taken into account by a court when determining the appropriate sentence for an offence. Sentencing requires the personal circumstances of the accused to be considered because they may impact upon his or her moral blameworthiness. In *Neal v The Queen*¹⁴ Brennan J commented that:

The same sentencing principles are to be applied, of course, in every case, irrespective of the identity of a particular offender or his membership of an ethnic or other group. But in imposing sentences courts are bound to take into account, in accordance with those principles, all material facts including those facts which exist only by reason of the offender's membership of an ethnic or other group.¹⁵

Martin Flynn observed that this principle is an illustration of the 'substantive equality principle';¹⁶ that is, in order for courts to treat Aboriginal people equally it is necessary to take into account any relevant differences.

These sentencing principles have been developed by the common law; however, in some jurisdictions there is also legislative authority for taking into account cultural issues during sentencing. In relation to adults the Western Australia legislation is silent on the relevance of cultural factors. In comparison, s 46(2)(c) of the *Young Offenders Act 1994* (WA) provides that when sentencing a young person the court is to take into account the cultural background of the offender.¹⁷ Other jurisdictions include, as a relevant sentencing factor, the cultural background of the offender (both for adults and children).¹⁸ In Queensland sentencing courts are required to consider any submissions from an Aboriginal community justice group that are relevant to sentencing, including submissions in relation to the offender's relationship with his or her community, cultural considerations and any programs or services that are available in the offender's community.¹⁹

One of the most important cases that has dealt with the sentencing of Aboriginal people is *R v Fernando*.²⁰ This case outlined a number of important principles, including:

- A sentencing court can take into account facts which exist only by reason of the offender's membership of an ethnic or other group.
- The Aboriginality of an offender may not necessarily mitigate punishment but may explain the offence and the circumstances of the offender.
- Imprisonment may not necessarily be effective at addressing the problems of alcohol abuse and violence within Aboriginal communities.
- Despite the ineffectiveness of imprisonment,

11. See *Crimes Act 1914* (Cth) s 16 A; *Crimes Act 1900* (ACT) ss 341, 342; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 3A & 5; *Sentencing Act 1995* (NT) s 5; *Criminal Law (Sentencing) Act 1988* (SA) ss 10, 11; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9.

12. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 35.

13. If an Aboriginal person was sentenced more leniently than a non-Aboriginal person merely because he or she was Aboriginal then this could arguably contravene the *Racial Discrimination Act 1975* (Cth). See *Rogers v Murray* (1989) 44 A Crim R 301. The NSWLRC stated that 'Aboriginality does not of itself mean that an offender will automatically receive special of lenient treatment, since it may have no bearing on the commission of the offence': see NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 28.

14. (1982) 42 ALR 609.

15. *Ibid* 626.

16. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15.

17. See also ss 6(f) and 7(l) of the *Young Offenders Act 1994* (WA) which provide that courts are to ensure young people are dealt with in a manner that is culturally appropriate and that courts are to generally take into account the cultural background of a young person.

18. *Crimes Act 1914* (Cth) s 16(2)(m); *Crimes Act 1900* (ACT) s 342(i). In New Zealand s 8(i) of the *Sentencing Act 1992* (NZ) provides that a court must take into account the cultural background of the offender.

19. *Penalties and Sentences Act 1992* (Qld) s 9(2)(o). This provision is included in an extensive list of other relevant sentencing factors.

20. (1992) 76 A Crim R 58.

sentencing courts must still ensure that Aboriginal people are protected by the law from violence.

- Although drunkenness is not generally a mitigating factor, 'where the abuse of alcohol by the person standing for sentence reflects the socio-economic circumstances and environment in which the offender has grown up, that can and should be taken into account as a mitigating factor'.²¹ It was said that this involves a 'realistic recognition by the court of the endemic presence of alcohol within Aboriginal communities, and the grave social difficulties faced by those communities where poor self image, absence of education and work opportunity and other demoralising factors have placed heavy stress on them, reinforcing their resort to alcohol and compounding its worst effects'.²²
- Imprisonment may be particularly harsh for an Aboriginal person who has had little experience with non-Aboriginal ways of life.
- While it is necessary to ensure that the punishment in any case fits the crime, it is also important to consider rehabilitation in order to prevent the offender from committing further offences.

In her background paper for this reference Victoria Williams provides numerous case examples where these principles have been taken into account.²³ These cases reveal that a number of different factors associated with an offender's Aboriginality have been considered as mitigation during sentencing proceedings.

Relevant factors

Socio-economic disadvantages

Courts have recognised socio-economic disadvantages suffered by many Aboriginal people. In doing so, courts have distinguished between Aboriginal people with a background of poverty, lack of education and employment, poor health, alcohol and substance abuse, and other people (Aboriginal or non-Aboriginal) who



have led a stable or relatively advantaged life.²⁴ Recently, in *Newcombe v Police*,²⁵ the South Australian Supreme Court took a much broader view of the relevance of socio-economic factors. In this case a 19-year-old Aboriginal male was convicted of an offence of damage which was his first offence. The court was referred to the low level of employment of Indigenous people compared with non-Indigenous people. It was argued that if a conviction was recorded for the offence the offender would be placed at an even greater disadvantage in respect of his prospects of future employment. The offender was fined, but released without a conviction.

Although many of the cases have dealt with problems faced by Aboriginal people in remote locations there is authority to suggest that relevant socio-economic factors can be taken into account for Aboriginal people living in urban areas.²⁶ In *Harradine v The Queen*²⁷ the majority of the South Australian Court of Criminal Appeal took into account the adjustment difficulties that the accused had faced when he moved to the city from a remote Aboriginal community.²⁸

However, two recent cases in New South Wales have taken a more limited view of the application of the principles defined in *R v Fernando*. The New South

21. Ibid 62.

22. Ibid.

23. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 1 (December 2003) 103–18. See also for a detailed discussion of some relevant cases, Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) ch 8.

24. *Rogers and Murray* (1989) 44 A Crim R 310, 307 (Malcolm CJ). See also Williams, *ibid*.

25. [2004] SASC 26 (Gray J).

26. *R v Fuller-Cust* [2002] VSCA 168, [91] (Eames JA).

27. (1991) 61 A Crim R 201.

28. Ibid 210 (Mulligan J), 205 (White J).

Imprisonment is a sanction foreign to Aboriginal customary law.

Wales Court of Criminal Appeal emphasised in *R v Newman*; *R v Simpson*²⁹ that the offenders were not from a remote community for whom imprisonment would be particularly harsh and the offences did not occur in a local or rural setting.³⁰ In *R v Walter and Thompson*³¹ the two accused persons were convicted of aggravated robbery. They had assaulted the victim after demanding that he remove and hand over his jeans. Prior to the incident both accused persons had been refused entry to a nightclub supposedly because one of them had been wearing tracksuit pants. The bouncer, who refused their entry, told police that when he saw them walking towards the nightclub he decided to refuse entry irrespective of the clothes they were wearing because they 'didn't look like our normal clientele'.³² The court held that the principles in *R v Fernando* did not apply to one of the accused because he did not come from a dysfunctional or deprived background.³³ It appears that in this case the impact of racism was not taken into account.³⁴ In the past, provocative racist behaviour has been taken into account as mitigation.³⁵

Alcohol and substance abuse

Intoxication does not usually amount to an excuse or provide any mitigation. However, where alcohol or substance abuse reflects the socio-economic environment in which the offender has grown up, this can be used in mitigating a sentence.³⁶ It is a requirement to show a link between the alcohol or substance abuse and the offender's background. It is not sufficient to merely rely on the fact that an offender

is Aboriginal and happened to be affected by alcohol at the time of the offence.³⁷

Hardship of imprisonment

Imprisonment is a sanction foreign to Aboriginal customary law. Although the traditional punishment of banishment involved removal of an Aboriginal person from their community, it did not involve incarceration. In some instances banishment has been to another community or to an outstation where there would still be a sense of connection to land and community.³⁸ With reference to international human rights standards that prohibit punishment that is cruel and inhumane, it was said during the Commission's consultations that:

For us, prison is cruel and inhumane.³⁹

Sentencing courts have recognised that imprisonment will be harder for Aboriginal people who face the loss of connection to land, culture, family and community.⁴⁰ In his background paper for this reference, Philip Vincent referred to the problems faced by Aboriginal people, especially children, in Western Australia because custodial facilities may be a long distance from their families and communities. As a result some Aboriginal prisoners are unable to maintain contact with their families.⁴¹ It has been observed that to imprison Aboriginal people is to 'take them from their group, their culture and too often their land; and to repeat to that group and to them the dislocation that has been going on for two centuries'.⁴² In one Western Australian case it was acknowledged that serving a sentence in a prison a long way from an Aboriginal

29. [2004] NSWCCA 102.

30. Ibid [30]. The main reason that Aboriginality was not taken into account in this case was because nothing had been presented to the court to show why issues connected with the offender's Aboriginality were relevant.

31. [2004] NSWCCA 304.

32. Ibid [18].

33. Ibid [58].

34. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15, 16.

35. *Pearce v The Queen* (1983) 9 A Crim R 146, where the accused and his friends were asked in an offensive manner to leave a party because they were Aboriginal.

36. *Juli v The Queen* (1990) 50 A Crim R 31, 36 (Malcolm CJ); *R v Fernando* (1992) 76 A Crim R 58, 62–63. The need to consider the subjective circumstances of the offender was referred to in *R v Tjami* [2000] SASC 311, 22 (Nyland J) when it was stated that 'not all Aboriginal persons or communities have problems with alcohol abuse, and it would be offensive to suggest otherwise'.

37. *R v Carr* [1999] NSWCCA 200, [31] (Studdert J, Simpson J concurring).

38. *R v Miyatatawuy* (1996) 135 FLR 173; *Atkinson v Walkely* (1984) 27 NTR 34; see also discussion under 'Traditional Punishments – Banishment or Exile', above p 90.

39. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 36.

40. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 101.

41. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 23.

42. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 89. A similar observation has been made in relation to Aboriginal peoples in Canada. It was stated that although 'Aboriginal peoples did not traditionally have the institution of imprisonment in their conceptual or architectural landscapes, they have, more than any other group in Canada, experienced its impact': see Jackson M, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) 103.

person's country is almost akin to being imprisoned in a foreign country.⁴³

Hearing loss

It has been recognised that a high proportion of Aboriginal people, in particular children, suffer from hearing loss and that social problems resulting from hearing loss may impact upon offending behaviour.⁴⁴ For some Aboriginal people hearing loss may compound other communication difficulties (such as language barriers) experienced within the criminal justice system.⁴⁵ Further, a sentence of imprisonment may be even more difficult for an offender who suffers from hearing loss.⁴⁶

Separation or removal from family

The effects of removing an Aboriginal offender from her family were taken into account in *R v Churchill*.⁴⁷ In this case the accused had been removed from her family by government agencies and placed on a mission. By the time the accused was free to return to her community, her family were fringe dwellers who regularly abused alcohol. The accused was convicted of the manslaughter of her partner and the offence was committed while she was under the influence of alcohol. The court took into account her long-standing alcohol problem, that it was linked to her family background and was a cause of her offending behaviour.

In *R v Fuller-Cust*⁴⁸ the accused was sentenced to 20 years' imprisonment for a number of serious offences including five charges of sexual assault. On appeal the majority of the Victorian Court of Criminal Appeal reduced the sentence to 17 years' imprisonment. Eames JA, who dissented, was of the view that factors associated with the accused's Aboriginality—the removal from his family, unsuccessful attempts to regain

contact with his mother (who was Aboriginal) and the anxiety that he suffered because he was unable to embrace his Aboriginality—should have been given more weight. There was psychological evidence to suggest that the offences were caused in part by this stress and his fear of rejection.⁴⁹ It has been commented that the judgment of Eames JA went further than the usual factors associated with socio-economic disadvantage of Aboriginal people and considered matters relating to the 'cultural harm that has been inflicted upon Indigenous communities'.⁵⁰

Violence

It has been suggested that in the past courts have imposed more lenient penalties on Aboriginal people who commit violent offences against other Aboriginal people, especially women and children.⁵¹ As a result some Aboriginal women perceive that courts do not consider the matter to be as serious when they are the victims of violent offences.⁵² However, more recently in cases of violence by Aboriginal men against Aboriginal women and children, courts have been less inclined to reduce the sentence as a result of factors associated with an offender's Aboriginality.⁵³ In Western Australia the Court of Criminal Appeal has acknowledged the need to protect Aboriginal women and that this will often mean that mitigatory circumstances such as socio-economic disadvantage will have less weight.⁵⁴ In *R v Daniel*⁵⁵ it was stated that Aboriginal people who commit violent offences against other members of their communities should not 'be accorded special treatment by the imposition of lighter sentences'.⁵⁶

In relation to the belief by some Aboriginal men that violence against Aboriginal women is acceptable under customary law, Kearney J in the Northern Territory Supreme Court stated that courts must endeavour to dispel the widespread belief that such violence is

43. *The State of Western Australia v Sturt* (Unreported, Supreme Court of Western Australia, No 5/2004, Murray J, 1 September 2004) Transcript of Proceedings 44. Also in *R v Turner* (Unreported, Supreme Court of Western Australia, No 211 of 2002, Anderson J, 19 August 2003), Transcript of Proceedings 51–52, the effect of imprisonment on an Aboriginal person who had never been away from his traditional area for more than a few weeks at a time was taken into account by the court when deciding to impose a sentence of life imprisonment rather than strict security life imprisonment for an offence of wilful murder.

44. Howard D, Quinn S, Blokland J & Flynn M, 'Aboriginal Hearing Loss and the Criminal Justice System' (1993) 3(65) *Aboriginal Law Bulletin* 9.

45. For a discussion of the communication problems faced by Aboriginal witnesses, see Part IX 'Difficulties Faced by Aboriginal Witnesses', below pp 396–401.

46. *Russell v The Queen* (1995) 84 A Crim R 386, 393 (Kirby ACJ).

47. (Unreported, Supreme Court of Western Australia, No 160/1998, Owen J, 6 October 1998).

48. [2002] VSCA 168.

49. *Ibid* [89]–[92]. O'Bryan AJA agreed that the issues in relation to the accused's Aboriginality were relevant. He did not consider that the sentence should be reduced below 17 years' imprisonment: see [154].

50. Edney R, 'The Stolen Generation and the Sentencing of Indigenous Offenders' (2003) 5(23) *Indigenous Law Bulletin* 10, 12 (emphasis omitted).

51. *R v Friday* (1985) 14 A Crim R 471, 472 (Campbell CJ).

52. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 45.

53. *R v Friday* (1985) 14 A Crim R 471, 473 (Connolly J).

54. *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302, 318.

55. [1998] 1 Qd R 499, 530–31 (Fitzgerald P).

56. *Ibid* 530–31 (Fitzgerald P).

acceptable.⁵⁷ The justification of violence and sexual abuse on the basis of Aboriginal customary law is considered in detail below.⁵⁸

Problems within the criminal justice system

Most of the cases that have taken into account factors associated with Aboriginality have focused on historical and socio-economic factors with far less emphasis on disadvantages within the criminal justice system. There are, however, some important cases that draw attention to deficiencies within the justice system in relation to Aboriginal people. In *Russell v The Queen*⁵⁹ Kirby ACJ acknowledged the high imprisonment rate of Aboriginal people and commented that:

[The] usefulness of long sentences for Aboriginal offenders must increasingly be called into question in light of the Royal Commission and the other reports, produced in recent years. Judges with the responsibility of sentencing must generally be familiar with these considerations.⁶⁰

In *R v Scobie*⁶¹ the court took into account the failure of government authorities to address the recommendations of the RCIADIC and that there had been no effective measures to address the accused's offending behaviour. In May 2005 the Western Australian Court of Criminal Appeal in *WO (A Child) v The State of Western Australia*⁶² made important observations about the inadequacy of programs and services for Aboriginal children in regional areas, as well as taking into account systemic bias within the system. In this case the President of the Children's Court had sentenced two young Aboriginal children to six months' detention. Both had been convicted of relatively serious offences and had breached a conditional release order previously imposed by the court. The court considered the question whether 'all reasonable steps towards the rehabilitation of these children had been taken' and in this regard noted that there were fewer programs and services available for this purpose in regional areas. The court also took into account that the rate of referral to diversionary juvenile justice options

is far less for Aboriginal children and as a result Aboriginal children come into contact with the formal criminal justice system at a much faster rate. Therefore, when making decisions based in part upon the offender's criminal record it was held that the court must be careful to ensure that the cumulative effect of previous decisions is taken into account and that details of any past offending are closely examined.⁶³

The view of the offender's community

As discussed earlier in this Part, Aboriginal communities are actively involved in the resolution of disputes under Aboriginal customary law and the purpose of customary law punishment is often to restore peace within the relevant community.⁶⁴ In cases where an Aboriginal offender has committed an offence against Australian law, as well as violating customary law, courts have taken into account the views of an offender's community. It has been held that the views of the offender's Aboriginal community can be taken into account in sentencing as long as giving effect to those views does not lead to a penalty that is inappropriate for the offence.⁶⁵

In the Northern Territory case, *R v Miyatatawuy*,⁶⁶ the offender was convicted of an assault against her partner. The victim informed the court that he did not wish for the offender to be imprisoned. In a written statement to the court the victim also outlined that the offender had been punished under Aboriginal customary law. After spending two years at a dry outstation the offender was now welcome back with her partner to the community. The views or wishes of a victim about the appropriate sentence are generally not relevant.⁶⁷ In *Miyatatawuy* the court held that it was entitled to take into account the wishes of the offender's community. The victim just happened to also be a member of that community.⁶⁸

Aboriginal courts throughout Australia (such as the Nunga Court, the Koori Court and circle sentencing courts) provide a direct mechanism for the views of

57. *Amagula v White* (Unreported, Supreme Court of Northern Territory, No JA 92/1997, Kearney J, 7 January 1998).

58. See discussion under 'Aboriginal Customary Law as the Reason or Explanation for the Offence', below pp 215–20.

59. (1995) 84 A Crim R 386.

60. Ibid 392.

61. [2003] SASC 85.

62. [2005] WASCA 94.

63. Ibid [65].

64. See discussion under 'Traditional Dispute Resolution', above pp 85–88.

65. See *R v Minor* (1992) 59 A Crim R 227; *Robertson v Flood* (1992) 111 FLR 177; *R v Miyatatawuy* (1996) 135 FLR 173.

66. (1996) 135 FLR 173.

67. *Coulthard v Kennedy* (1992) 60 A Crim R 415, 417. Section 25(2) of the *Sentencing Act 1995* (WA) provides that a victim impact statement is not to address the way in which or the extent to which an offender should be punished.

68. See discussion of this case in Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 38.

the offender's community to be taken into account. Again, these views cannot override what is considered to be the appropriate sentence by the relevant judicial officer.⁶⁹ It should not be assumed that an Aboriginal offender's community will necessarily seek more lenient penalties. In relation to circle sentencing in New South Wales, it has been observed that sentences suggested by the Aboriginal Elders were at the 'heavier end of the scale'.⁷⁰

Aboriginal customary law

As a consequence of the principle that relevant factors associated with an offender's Aboriginality can be taken into account in sentencing, there is extensive judicial authority for the consideration of Aboriginal customary law when sentencing. The issue of Aboriginal customary law and sentencing is separately discussed below.⁷¹

The Commission's view

While there is ample case law authority to allow matters associated with an offender's Aboriginality to be taken into account during sentencing, the cases are not consistent in approach. The spotlight is generally on socio-economic disadvantage. Although there are some more recent cases (discussed above) that have taken a broader view of the types of factors that relate to an offender's Aboriginality,⁷² there is no way of knowing whether this approach will be adopted by all courts, especially the lower courts that deal with Aboriginal people on a daily basis. For the purposes of consistency and to ensure that important issues associated with the Aboriginality of an offender are not overlooked, the Commission is of the view that there should be a legislative direction to have regard to the cultural background of the offender. There is no reason to limit this provision only to Aboriginal people because matters associated with the cultural background of other groups in the community may also be relevant to sentencing.⁷³

Given the current structure of the Act such a provision may appear out of place. Where a similar provision appears in legislation in other jurisdictions it is contained in a list of other relevant sentencing factors. The Commission suggests that the Act should be amended to include a list of factors that are generally considered relevant to sentencing. This list should be for the purpose of guidance for the judiciary as well as the defence and prosecution, but it should not constitute an exhaustive list because flexibility is required in sentencing.

Proposal 29

That the *Sentencing Act 1995* (WA) include as a relevant sentencing factor the cultural background of the offender.

Imprisonment as a Sentence of Last Resort

Over-representation of Aboriginal people in custody

Despite the practice of sentencing courts throughout Australia taking into account relevant factors associated with the Aboriginality of an offender, and the numerous reports and inquiries that have recommended changes to the criminal justice system, the rate of imprisonment of Aboriginal people continues to rise and remains disproportionate to the rate of imprisonment of non-Aboriginal people. Western Australia has a 'long-established and continuing tradition of high rates of imprisonment'.⁷⁴ In 2003 the rate of imprisonment for all people in Western Australia was higher than anywhere else in Australia except for the Northern Territory.⁷⁵ What is more disturbing is that Western Australia has by far the highest rate of imprisonment of Aboriginal people in the nation.⁷⁶ As stated by Morgan and Motteram, 'Aboriginal Western Australians are

69. For a detailed discussion, see 'Aboriginal Courts', above pp 142–57.

70. Holmes J, 'Inside the Circle', *Four Corners*, 10 October 2005.

71. See discussion under 'Aboriginal Customary Law and Sentencing', below pp 212–24.

72. See, in particular, the approach taken by the Western Australian Court of Criminal Appeal in *WO (A Child) v The State of Western Australia* [2005] WASCA 94. For further discussion, see Proposal 30 under 'Imprisonment as a Sentence of Last Resort', below p 212.

73. The Commission notes that the Law Society of Western Australia in a submission for this project supported a statutory requirement for all offenders that in sentencing a court must take into account the offender's cultural background: see Law Society of Western Australia, Written Submission, 19 October 2005.

74. Harding R, 'The Excessive Scale of Imprisonment in Western Australia: The systemic causes and some proposed solutions' (1992) 22 *The University of Western Australia Law Review* 72, 73. The Department of Justice has stated that Western Australia 'has a justice system characterised by over use of imprisonment': see Department of Justice, *Reform of Adult Justice in Western Australia* (2002) 6.

75. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 15.

76. *Ibid* 16; and see discussion under 'Over-representation in the Criminal Justice System', above p 95.

Part of the reason for the high levels of over-representation of Aboriginal people in custody is the cumulative effect of discriminatory practices within the justice system.

amongst the most imprisoned people in the world and their position has deteriorated rapidly over the last two years'.⁷⁷

Aboriginal people who were consulted by the Commission acknowledged that imprisonment is required for some offenders; however, many considered 'the current levels of mass incarceration as destructive of Aboriginal culture and law'.⁷⁸ For example, in Laverton it was stated that:

Too many people get picked up for minor stuff – causes cultural dislocation and disharmony: they never get jobs or back on track.⁷⁹

The issue of over-representation must be addressed both for the welfare of Aboriginal people generally and to ensure that the criminal justice system does not further contribute to the destruction of Aboriginal customary law.

Earlier in this Part the Commission considered some of the reasons for the high level of over-representation of Aboriginal people in custody.⁸⁰ Generally, the causes can be categorised as historical factors, factors resulting from socio-economic disadvantages, and problems within the criminal justice system. In 1986 the ALRC concluded that the main causes of the level of over-representation of Aboriginal people in custody were related to problems outside the criminal justice system. The ALRC acknowledged that if steps were taken at all levels of the criminal justice system (police, courts and prisons) there may be some limited improvement.⁸¹ However, since that time the RCIADIC published its extensive recommendations dealing with Aboriginal

people and the criminal justice system. It is now widely acknowledged that part of the reason for the high levels of over-representation of Aboriginal people in custody is the cumulative effect of discriminatory practices within the justice system.

Possible solutions to reduce the level of over-representation of Aboriginal people in custody

Imprisonment as a sentence of last resort

In response to the disproportionate rate of imprisonment of Aboriginal people, the RCIADIC recommended that 'governments which have not already done so should legislate to enforce the principle that imprisonment should be utilised only as a sanction of last resort'.⁸² This principle is reflected in s 6(5) of the Act which provides that imprisonment must not be imposed unless a court decides that the seriousness of the offence justifies imprisonment or the protection of the community requires it.⁸³ Further, s 39 sets out the different sentencing options that are available in Western Australia and requires that the option of imprisonment cannot be imposed unless the court is satisfied that all other options are inappropriate.⁸⁴ In relation to juveniles s 7(h) of the *Young Offenders Act 1994* (WA) provides that detention should only be used as a last resort.

Most jurisdictions within Australia contain legislative provisions to the effect that imprisonment must not be imposed by a court unless all other sentencing options are considered inappropriate.⁸⁵ However,

77. Ibid 7.

78. Ibid. See for example LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37; Warburton, 3–4 March 2003, 5. In a study of traditional Aboriginal prisoners in 1982 it was found that imprisonment disrupted traditional law ceremonies: see Duckworth A, Foley-Jones C, Lowe P and Maller M, 'Imprisonment of Aborigines in North Western Australia' (1982) 15 *Australian and New Zealand Criminal Law Journal* 26, 37 & 40.

79. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.

80. See discussion under 'Over-representation in the Criminal Justice System', above p 95.

81. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No 31 (1986) [538].

82. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendation 92.

83. Morgan N, 'Business as Usual or a "New Utopia"? Non-Custodial Sentences Under Western Australia's New Sentencing Laws' (1996) 26 *The University of Western Australia Law Review* 364, 369–70.

84. The principle is also reflected in s 35(1) of the *Sentencing Act 1995* (WA) which requires a court that has imposed a sentence of 12 months' imprisonment or less to provide written reasons as to why no other sentencing option was available.

85. See *Crimes Act 1914* (Cth) s 17A; *Crimes Act 1900* (ACT) s 345; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5; *Criminal Law (Sentencing) Act 1988* (SA) s 11; *Sentencing Act 1991* (Vic) s 5(4); *Sentencing Act 1997* (Tas) s 12.

Queensland is the only jurisdiction when dealing with adult offenders to directly use the phrase: 'imprisonment should only be imposed as a sentence of last resort'.⁸⁶

Bearing in mind the level of over-representation of Aboriginal people in custody it has been said that the principle that imprisonment should only be used as a last resort has particular reference to Aboriginal people.⁸⁷ However, endorsement of this principle in Australian legislation has not yet resulted in any significant reduction in the rate of Aboriginal imprisonment.⁸⁸

Individual causes of over-representation

One approach to deal with the disproportionate rate of imprisonment of Aboriginal people is to respond to the individual causes of over-representation. This is not new: government agencies have attempted in the past and continue to attempt to address individual factors that cause over-representation. As observed by Morgan and Motteram:

There has been a plethora of reports aimed at addressing Aboriginal justice issues over the past four years and they have all agreed, explicitly or implicitly, that imprisonment is not the answer.⁸⁹

In this Discussion Paper the Commission has made proposals aimed at recognising Aboriginal customary law as well as reducing the level of imprisonment of Aboriginal people in Western Australia. However, these reforms will take time to implement and longer to have any significant effect on the imprisonment rates. For example, the Commission considers that its proposal for community justice groups has the potential to reduce imprisonment rates in the long-term through the use of diversionary options and support for Aboriginal-controlled crime prevention and justice mechanisms.⁹⁰ In the meantime, it is unacceptable for Aboriginal people to continue to be imprisoned at such excessive rates.

Legislative change: The Canadian model

Over-representation of Indigenous people within the criminal justice system is not unique to Australia. As a response to the level of over-representation in Canada the *Criminal Code 1985* (Canada) was amended in 1996 to include the following principle:

All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, *with particular attention to the circumstances of aboriginal offenders*.⁹¹

The Canadian Supreme Court considered this principle in *R v Glaude*⁹² and held that it was introduced for the purpose of reducing the tragic over-representation of Aboriginal people in Canadian prisons. The court held that the section directs sentencing courts to undertake the sentencing process for Aboriginal offenders differently, 'in order to endeavour to achieve a truly fit and proper sentence in the particular case'.⁹³ Further, it was stated the phrase 'particular attention' to the circumstances of Aboriginal offenders does not mean that judges are to pay 'more' attention when sentencing Aboriginal offenders.⁹⁴ Rather, the court held that judges should 'pay particular attention to the circumstances' of Aboriginal offenders 'because those circumstances are unique, and different' from those of non-Aboriginal offenders.⁹⁵ The court also observed that imprisonment may be less appropriate or a less useful sanction for Aboriginal offenders.⁹⁶ Importantly, the court observed that the Canadian government's objective when enacting the section was directed at reducing the use of prison, increasing the use of restorative justice principles in sentencing and utilising where possible Aboriginal community justice initiatives when sentencing Aboriginal offenders.⁹⁷

The Supreme Court of Canada emphasised that this approach did not mean that Aboriginal people would escape prison for serious or violent offences. Sentencing requires a case-by-case approach and the question

86. Section 9(2) of the *Penalties and Sentences Act 1992* (Qld) provides that a court must have regard to, amongst other things, the principles that a 'sentence of imprisonment should only be imposed as a last resort' and a 'sentence that allows the offender to stay in the community is preferable'.

87. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 31.

88. See discussion under 'Over-representation in the Criminal Justice System', above p 95.

89. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 18.

90. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

91. *Criminal Code 1985* (Canada) s 718.2(e).

92. [1999] 171 DLR (4th) 385.

93. *Ibid* [33] (Cory & Iacobucci JJ).

94. *Ibid* [37].

95. *Ibid*.

96. *Ibid*.

97. *Ibid* [47]. At the same time as the introduction of s 718.2(e), other principles were included in the *Criminal Code* such as the objective to 'provide reparations for harm done to victims or to the community and 'to promote a sense of responsibility in offenders': see *Criminal Code 1985* (Canada) ss 718 (e)–(f).

should be: 'for this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the *Criminal Code*?'⁹⁸

A legislative provision for Western Australia

Bearing in mind that the principle that imprisonment should only be used as a last resort is already reflected in the Act; that the common law sentencing principles allow for issues connected with an offender's Aboriginality to be taken into account; and that the Commission has considered individual problems within the criminal justice system that contribute to the level of over-representation, is it necessary to introduce a legislative provision in similar terms to the Canadian model?

It has been argued that current common law sentencing principles in Australia suggest that Aboriginality only becomes relevant if the offender 'suffers from economic or social disadvantage'.⁹⁹ As discussed above in relation to the approach taken by courts when sentencing Aboriginal offenders, historical and socio-economic factors have received most attention. Apart from a handful of cases there has been limited recognition by courts of discriminatory practices within the criminal justice system itself.¹⁰⁰ For example, the discussion earlier in this Part refers to statistics that indicate that Aboriginal children have been referred to diversionary juvenile justice options, such as the juvenile justice teams, far less often than non-Aboriginal children.¹⁰¹ Therefore, as a result of being charged more readily, Aboriginal children generally accumulate a criminal record faster and reach the stage of custody sooner than non-Aboriginal children.¹⁰²

As observed in *R v Carberry*,¹⁰³ the sentencing principles which have been developed by the courts for dealing

with Aboriginal people have not avoided the high level of over-representation of Aboriginal people in custody.¹⁰⁴ Martin Flynn argued that sentencing principles should 'respond to both the fact that, nationally, an Indigenous person is 16 times more likely than a non-Indigenous person to be in prison and the reasons for that fact'.¹⁰⁵ Legislative reform similar to the Canadian provision would have the effect of directing judicial officers to 'exhaust in practice all sentencing options other than imprisonment'.¹⁰⁶ One aspect to this approach is for a sentencing court to consider 'culturally relevant' non-custodial sentencing options.¹⁰⁷

One argument against a legislative direction to courts to pay particular attention to the circumstances of Aboriginal offenders when considering whether to impose imprisonment is that it would be discriminatory. However, the Commission considers that such a provision would fall within the meaning of a special measure under s 8 of the *Racial Discrimination Act 1975* (Cth). As discussed in Part IV on international law, affirmative action or special measures are permitted in order to achieve substantive equality.¹⁰⁸ The former Aboriginal and Torres Strait Islander Social Justice Commissioner has argued that:

The view that everyone should be treated the same overlooks the simple fact that throughout Australian history Indigenous peoples never have been...The failure to provide us with the same opportunities as the rest of society in the past means that to now insist on identical treatment will simply confirm the position of Indigenous people at the lowest rungs of Australian society.¹⁰⁹

The provision would not have the effect of automatically reducing the sentence for any Aboriginal person who

98. Ibid [80].

99. Edney R, 'Imprisonment as a Last Resort for Indigenous Offenders: Some lessons from Canada?' (2005) 6(12) *Indigenous Law Bulletin* 23, 25.

100. See discussion under 'The Relevance of Aboriginality to Sentencing – Problems within the Criminal Justice System', above pp 206–207.

101. See discussion under 'Over-representation in the Criminal Justice System', above p 95.

102. For example, a case study in the report *Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth* revealed that a 14-year-old Aboriginal boy from a regional area received a conditional release order for his first offence. This order is the most serious sanction available in the Children's Court other than a custodial sentence. This young boy had never been referred to the juvenile justice team either by police or by the courts. See Morgan N, Blagg H & Williams V, 'Mandatory Sentencing in Western Australia and the Impact on Aboriginal Youth' (Perth: Aboriginal Justice Council, December 2001) 64.

103. [2000] ACTSC 60.

104. Ibid [8] (Miles CJ).

105. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15.

106. Edney R, 'Imprisonment as a Last Resort for Indigenous Offenders: Some lessons from Canada?' (2005) 6(12) *Indigenous Law Bulletin* 23, 25. Richard Edney has also suggested that courts should be provided with a prison impact statement for Aboriginal offenders addressing any previous terms of imprisonment, previous programs made available to the offender, assessment of the impact of a term of imprisonment on the offender and his family, and possible treatment options available for the offender including resources available in the offender's community. He then argues that courts should not impose a term of imprisonment unless it would be 'likely to be of more benefit than not for the offender'. See Edney R 'The Need for a Higher Custody Threshold for Indigenous Offenders in Victoria' (2004) 6(6) *Indigenous Law Bulletin* 17, 19. The Commission considers that the decisive issue should be the likely benefit to the entire community.

107. Flynn M, 'Not "Aboriginal Enough" for Particular Consideration When Sentencing' (2005) 6(9) *Indigenous Law Bulletin* 15, 17.

108. See discussion under Part IV 'Recognition of Customary Law and the Principle of Equality', above pp 72–73.

109. Human Rights and Equal Opportunity Commission, *Social Justice Report*, Report No 2 (2001) as quoted in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 35.

came before the courts for sentencing. General sentencing principles would still apply and where an offence was particularly serious imprisonment would be required. It would also be necessary for a sentencing court to consider the particular circumstances of the offender and whether that offender's antecedents indicated that he or she may have suffered the negative effects of a system that generally discriminates (whether indirectly or directly) against Aboriginal people.

In considering whether the use of imprisonment as a punishment for Aboriginal people should be legislatively discouraged it is important to bear in mind that there is 'no evidence to suggest that penal policy and practice has done anything to make Western Australia, on the one hand, safer or, on the other hand, more dangerous'.¹¹⁰ Apart from punishing an offender, imprisonment is assumed to deter the offender (as well as other potential offenders) from breaking the law. The ALRC noted that for Aboriginal people it is a 'widely held view that no stigma attaches to going to gaol'.¹¹¹ John Nicholson has observed that some Aboriginal men consider prison as a 'rite of passage' and therefore it may be pointless to continue to impose penalties that neither deter nor rehabilitate Aboriginal offenders.¹¹²

The Commission's view

The lack of judicial decisions that acknowledge the detrimental effect of practices within the criminal justice system upon the rate of imprisonment of Aboriginal people, justifies the introduction of a legislative provision which directs courts to consider the circumstances of Aboriginal people when deciding whether to impose a custodial sentence. The Commission has proposed that the cultural background of an offender should be included in the Act as a relevant sentencing factor. This does not directly deal with factors that contribute to the disproportionate rate of imprisonment. The Commission is of the view that there should be a separate provision, applicable to both adults and juveniles, directing courts to have

regard to the circumstances of Aboriginal people in deciding whether imprisonment is appropriate.

Proposal 30

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended by including a provision that:

When considering whether a term of imprisonment is appropriate the court is to have regard to the particular circumstances of Aboriginal people.

Aboriginal Customary Law and Sentencing

There is a long history of judicial recognition of Aboriginal customary law when sentencing Aboriginal offenders. Most commonly this has occurred when an offender is liable to traditional punishment under Aboriginal customary law. Courts have also, although far less often, considered aspects of Aboriginal customary law when considering the reason or explanation for an offence.¹¹³ To determine whether there is any need for reform it is necessary to examine the common law principles that have developed in relation to Aboriginal customary law and sentencing.

Traditional Punishment as Mitigation

If an Aboriginal person commits an offence against Australian law and the conduct giving rise to the offence also violates Aboriginal customary law the person may be liable to face two punishments. In her background paper, Williams examined numerous Australian cases where sentencing courts have taken into account as mitigation the fact that the offender has been or will be subject to traditional punishment.¹¹⁴ Traditional punishment is a factor to be considered because the offender is Aboriginal and therefore falls within the principle as set out above in *R v Neal*.¹¹⁵ In addition, traditional punishment may result in a less

110. Harding R, 'The Excessive Scale of Imprisonment in Western Australia: The Systemic Causes and Some Proposed Solutions' (1992) 22 *The University of Western Australia Law Review* 72, 75. See also Department of Justice, *Reform of Adult Justice in Western Australia* (2002) 10.

111. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [535].

112. Nicholson J, 'The Sentencing of Aboriginal Offenders' (1999) 23 *Criminal Law Journal* 85, 88. This was alluded to during the consultations at Albany where it was stated that some 'boys see prison as a rite of passage, although they are still scared when they arrive': see LRCWA, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 19. See also LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 12; *Carnarvon*, 30–31 July 2003, 2, 6.

113. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia, Project No 94, Background Paper No 1 (December 2003) 101.

114. *Ibid* 16–46. This background paper dealt with cases from approximately 1980 onwards. For a case digest of earlier cases, see Crawford J & Hennessy P, *Cases on Traditional Punishments and Sentencing* (Sydney: ALRC, 1982).

115. (1982) 42 ALR 609.

If an Aboriginal person commits an offence against Australian law and the conduct giving rise to the offence also violates Aboriginal customary law the person may be liable to face two punishments.

severe sentence because of the principle that a person should not be punished twice for the same offence.¹¹⁶

The legality of traditional punishments under Australian law

Some physical traditional punishments may constitute an offence against Australian law. When taking such punishments into account courts have stated that they are not condoning or sanctioning the infliction of unlawful violence.¹¹⁷ While recognising that traditional punishment has or will take place courts have generally avoided incorporating the punishment into a sentencing order. In *R v Sydney Williams*¹¹⁸ the sentencing judge imposed a suspended sentence of imprisonment on condition that the offender (who was convicted of manslaughter) return to his community and follow the lawful orders and directions of the Tribal Elders. Although there was no mention of the traditional punishment in the sentencing remarks, the ALRC noted that traditional punishment had been referred to by counsel. Subsequent to his release and while he was at the community as required by the court order, Sydney Williams was speared in the leg.¹¹⁹ This case illustrates the dilemma for sentencing courts: the need to balance the potential conflict between the requirement to treat Aboriginal people fairly and the constraints of Australian law. The ALRC concluded that where a traditional punishment would be unlawful it could not be included in a sentencing order.¹²⁰ Despite this in *R v Wilson Jagamara Walker*¹²¹ the court imposed a suspended sentence of imprisonment with a condition that the offender return to the community where it was proposed spearing would take place.

On the other hand, where the proposed form of traditional punishment is not unlawful there is nothing to prevent that punishment from being incorporated into a sentencing order. For example, in *Mununggurr v The Queen*¹²² the court imposed as a condition upon release from prison (to be subject to a suspended sentence) that the offender attend a meeting in his community.

Another issue that arises because of the unlawfulness of some traditional punishments is whether sentences can be imposed to protect the offender from traditional punishment. The ALRC observed that imprisonment should not to be used as a 'device for a paternalistic form of preventive detention'¹²³ and concluded that an offender:

[S]hould not be sentenced to a longer term of imprisonment than would otherwise apply, merely to 'protect' the defendant from the application of customary laws including 'traditional punishment' (even if that punishment would or may be unlawful under the general law).¹²⁴

Past and future traditional punishment

In some cases courts have reduced the sentence because the offender has already undergone traditional punishment. In other cases courts have taken into account the fact that an offender will be liable to traditional punishment in the future.¹²⁵ The ALRC observed that in cases where the punishment has not yet taken place, despite the uncertainty as to the exact nature of the punishment, courts have still been willing to reduce the sentence.¹²⁶ This latter category is more

116. *R v Minor* (1992) 59 A Crim R 227, 238 (Mildren J). See also ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [508].
117. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 16. In *The State of Western Australia v Sturt* (Unreported, Supreme Court of Western Australia, No 5/2004, Murray J, 1 September 2004) acknowledged the probability that the accused would be traditionally punished upon her release from custody, but at the same time made it clear that the court was not condoning the punishment: see Transcript of Proceedings 46–47.
118. (Unreported, Supreme Court of South Australia, Wells J, 14 May 1976).
119. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [492].
120. Ibid [512].
121. (1994) 68(3) *Aboriginal Law Bulletin* 26.
122. (1994) 4 NTLR 63, [39].
123. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [505].
124. Ibid [505].
125. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 17.
126. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [507].

controversial especially if the information provided to the sentencing court is unreliable or the offender does not attend for traditional punishment as originally proposed.

Double punishment

Many Aboriginal people consulted by the Commission expressed concern at the issue of double punishment.¹²⁷ In some cases when an Aboriginal person is sentenced to a term of imprisonment under Australian law—in addition to the problems that arise from being removed from his or her culture, land, community and family—the term of imprisonment is served with the knowledge that upon release the accused will still be liable to traditional punishment and that because of his or her absence family members may also suffer punishment.

One view expressed during the Commission's consultations was that Aboriginal people should not have to face two punishments: there should only be one.¹²⁸ However, generally the consultations revealed that Aboriginal people desire an appropriate balance between Australian law and Aboriginal customary law; in particular, a balance between the two punishments imposed.¹²⁹ In Warburton it was argued that there should be more weight placed on traditional punishments in mitigation of sentence.¹³⁰ During the Commission's consultations in Casuarina Prison it was said that 'going through Aboriginal punishment should mean a reduced sentence'.¹³¹

In Western Australia the principle that a person should not be punished twice for the same offence is recognised in s 11 of the Act which provides that, if the evidence that establishes one offence also establishes another offence, the offender can only be

sentenced for one of the offences.¹³² Currently this provision cannot be relied upon to argue that if a person has been punished under Aboriginal customary law he or she cannot be punished under Australian law. This is because customary law offences are not recognised by Australian law. If offences under Aboriginal customary law were to be recognised for the purposes of s 11 of the Act then in cases where an Aboriginal person had been punished under customary law no punishment could be imposed under Australian law.

In order for Aboriginal people to be protected by Australian law it is necessary that they are bound by Australian law. The Commission is of the view that it would not be appropriate to legislate that punishment under Aboriginal customary law precludes punishment under Australian law. The Commission recognises the need for courts to consider Aboriginal customary law consequences so that Aboriginal people do not face excessive punishment.

Traditional punishments which have been considered by courts

Although the most well-known and controversial forms of traditional punishment are physical punishments such as spearing or beatings;¹³³ various other forms of traditional punishment, such as banishment, community meetings and reprimands by Elders have been taken into account as mitigation.¹³⁴ For example, in *R v Miyatatawuy*¹³⁵ the Northern Territory Supreme Court took into account the fact that the offender and her husband (the victim) had been banished to a dry community for two years and as a result both the offender and the victim had successfully overcome their alcohol addiction.¹³⁶

127. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13 & 16; *Bandyup Prison*, 17 July 2003, 2; *Albany*, 18 November 2003, 16.

128. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13.

129. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42; *Warburton*, 3–4 March 2003, 6; *Cosmo Newbery*, 6 March 2003, 19; *Pilbara*, 6–11 April 2003, 9, 12.

130. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3, 4 March 2003, 6.

131. LRCWA, Project No 94, *Thematic Summaries of Consultations – Casuarina Prison*, 23 July 2003, 4. But note that in Wuggubun it was said that double punishment may be a good thing in terms of deterrence (provided that traditional punishment took place first): see LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 37.

132. *Sentencing Act 1995* (WA) s11(1). Section 11(3) provides that it is an exception if the act or omission of an offender causes the death of another. In this situation the offender may be sentenced for the offence of which he or she is guilty by reason of causing the death despite the fact that he or she has already been sentenced for some other offence constituted by that act or omission.

133. For case examples, see *Williams V, The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 18.

134. *Ibid* 17–20.

135. (1996) 135 FLR 173.

136. Banishment was also taken into account in *Atkinson v Walkely* (1984) 27 NTR 34 and *Ogle v Mahoney* (Unreported, Supreme Court of Queensland, Court of Appeal, CA No 132/1997, 5 August 1997). In *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998) the offender who was physically punished was apparently also subject to permanent banishment from his community. Scott J questioned this aspect because the purpose of traditional punishment is usually described as healing and the restoration of peace. It was submitted by defence counsel that the banishment was part of the punishment in this case.

Williams observed that all of the Western Australian cases examined in her background paper involved physical punishment of some kind.¹³⁷ One explanation for the reluctance of courts and legal representatives to consider other forms of punishment or methods of resolving disputes under customary law may be a lack of awareness of the powerful and important nature of various non-physical sanctions. Aboriginal courts such as the Nunga Court, Koori Court and circle sentencing have led to a greater awareness of the benefits of culturally appropriate shaming. The Commission's proposal for the greater use of Aboriginal courts in Western Australia, as well as the proposal for community justice groups, should encourage the recognition of non-violent Aboriginal customary law sanctions.¹³⁸

Courts to be satisfied that punishment was undertaken in accordance with Aboriginal customary law

During the consultations the Commission was made aware of the need to consider whether traditional punishment was undertaken in accordance with Aboriginal customary law. In Laverton it was expressed that 'payback should not be confused with alcohol-related violence' and in order to distinguish between the two it was suggested that 'courts should consider whether Elders were there; whether the person had gone back to the community or family; and whether there was a clear mind'.¹³⁹ Similarly, during the Pilbara consultations it was stated that 'traditional punishment in fact must be done while sober, and administered properly, using the appropriate tools, and in the appropriate places'.¹⁴⁰ In Warburton it was explained that, 'properly done, it was a formal and regulated process (and that it is quite different from alcohol-related violence)'.¹⁴¹

In *R v Minor*¹⁴² Asche CJ stated that if payback is no more than a revenge attack it could not be taken into

account during sentencing.¹⁴³ In *Mamarika v The Queen*¹⁴⁴ the court found that the punishment had not been undertaken in accordance with customary law because there had been no community meeting of Elders and those who inflicted the punishment were under the influence of alcohol. Nevertheless the court still took into consideration the fact that the offender had suffered as a result of committing the offence.¹⁴⁵ Although there are conflicting views as to whether private violent revenge can be taken into account as mitigation;¹⁴⁶ physical punishment inflicted upon an Aboriginal offender should only be categorised as traditional punishment if it has been undertaken in accordance with the requirements of Aboriginal customary law.

In the Northern Territory, courts have been informed that the purpose of the traditional punishment is to restore peace and heal the community. It is not common in Western Australian for this type of information to be presented to the court.¹⁴⁷ In order to prevent any distortion of Aboriginal customary law, courts should be satisfied that the punishment was properly done in accordance with Aboriginal customary law. If an Aboriginal person suffers violence as a result of committing an offence and this cannot properly be categorised as Aboriginal customary law then general sentencing principles should determine the weight (if any) to be given in mitigation.

Aboriginal Customary Law as the Reason or Explanation for an Offence

General principles

Sentencing courts have also taken Aboriginal customary law into account when assessing the reason why the offender committed an offence. Consideration of an

137. The Commission notes that the cases considered by Victoria Williams are those that are publicly available or were otherwise known to the author. There may be instances, in particular in the Magistrates Courts, where other non-physical punishments have been considered.

138. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41 and 'Aboriginal Courts', above pp 142–57.

139. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 14.

140. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 8.

141. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

142. (1992) 59 A Crim R 227.

143. Ibid 228.

144. (1982) 42 ALR 94.

145. Ibid 97.

146. In *R v Gooley* (1996) 66 SASR 380, 383 (Doyle J) it was held that private revenge cannot be considered in mitigation. However, in *R v Daetz; R v Wilson* [2003] NSWCCA 216 [16] (James J, Tobias JA and Hulme J concurring) it was held that private revenge in the form of a serious assault on the offender by others who were connected to the victim could properly be taken into account in mitigation because otherwise the court would not be able to ensure that the offender did not suffer excessive punishment.

147. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 21. A recent example in the Northern Territory is *R v Jones* (Unreported, Supreme Court of Northern Territory, SCC No 20309047, Angel J, 27 February 2004). In this case the offender had been convicted of the manslaughter of his brother. The court was told that payback had been affected and the matter had been 'settled according to customary law' and the family wished for the matter to be at an end.

offender's reasons or motives is a legitimate sentencing factor. For example, a person who steals money to feed his or her family would, all things being equal, receive a more lenient penalty than someone who steals money for greed.

Williams has observed that generally courts have been less reluctant to take into account Aboriginal customary law as the reason for the offending behaviour.¹⁴⁸ In some cases this may have been due to the manner in which the information was presented to the court. For example, in *R v Owen Bara*¹⁴⁹ it was submitted to the court that the young Aboriginal offender had committed a number of offences as a result of cultural peer pressure. The Supreme Court of the Northern Territory rejected this argument. No information had been presented to the court about the nature of the cultural pressure. In *R v Brand*¹⁵⁰ two Aboriginal women were convicted of assault occasioning bodily harm. The court was told that there was a long-standing dispute between the offenders and the victim (also an Aboriginal woman). One of the causes of this dispute was that the victim had apparently had a sexual relationship with the traditional husband of one of the offenders. Malcolm CJ noted in his judgment that it had not been argued that the assault on the victim was justified under Aboriginal customary law. It is impossible to know whether Aboriginal customary law did play a part in either of these cases or if the lack of information simply reflected that customary law was not in fact relevant. What these cases (as well as others)¹⁵¹ show is that courts, quite correctly, do not infer or assume that customary law played a part in the offence without clear evidence.

In other cases, despite arguments to the contrary, the court has rejected the contention that the offence was committed because of Aboriginal customary law. In *Ashley v Materna*¹⁵² the accused was convicted of assaulting his sister. It was argued that because the

victim's husband had sworn at her in the presence of the accused there was a breach of customary law and the accused was allowed to punish her. This explanation was rejected by the court. There was no evidence that the assault was obligatory under customary law or that the offender would face any consequences if he had not 'punished' his sister. In addition, the offender was affected by alcohol at the time of the offence. Therefore, the court held that the conduct could not be properly categorised as Aboriginal customary law.¹⁵³

In some instances, even though an offender has engaged in conduct that is either obligatory or acceptable under Aboriginal customary law, courts have taken the view that the offence is considered too serious under Australian law for there to be any significant reduction in penalty. This has usually arisen in cases of violence or sexual abuse against Aboriginal women and children.

Violent and sexual offences

In the past there have been instances where courts have treated Aboriginal men who commit violent or sexual offences against women and children more leniently than non-Aboriginal offenders. In 1975 in relation to an offence of carnal knowledge of a 10-year-old child, it was stated that:

[T]his is a serious offence and young girls like this one must be protected against themselves. Nevertheless, I do not regard this offence as seriously as I would if both participants were white. This is of course not to say that the virtue of Aboriginal girls is of any less value than that of white girls, but simply that social customs appear to be different.¹⁵⁴

The justification of violence or sexual offending against Aboriginal women and children by reference to Aboriginal customary law has been met with strong disapproval by numerous commentators.¹⁵⁵ Megan Davis

148. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 22. In two South Australian cases Aboriginal customary law was used to explain offences of arson. In *R v Goldsmith* (1995) 65 SASR 373 the Aboriginal offender set fire to the house where his friend had died. The court took into account the offender's cultural belief that the lighting of the fire would allow the spirit of his friend to rest in peace. In *R v Shannon* (1991) 57 SASR 14 the court took into account as mitigation the fact that the offender lit the fire to protect himself from his father who had threatened the offender with the 'kadaitcha' men.

149. (Unreported, Supreme Court of the Northern Territory, SCC 20016855/20020942, Bailey J, 30 July 2001).

150. [1998] WASCA 279.

151. See also *R v Herbert* (1983) 23 NTR 22; *Janima v Edgington* (Unreported, Supreme Court of the Northern Territory, No 36/1995, Mildren J, 6 September 1995).

152. (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997).

153. *Ibid* 9.

154. *R v Mangukala* (Unreported, Supreme Court of the Northern Territory, SCC No 313/1974, Forster J, 18 April 1975).

155. See for example Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems Facing Aboriginal Women Victims of Rape in Central Australia' in Easteal P (ed.), *Without Consent: Confronting Adult Sexual Violence* (Canberra: Australian Institute of Criminology, 1993) 149; Payne S, 'Aboriginal Women and the Law' in Easteal P & McKillop S (eds), *Women and the Law* (Canberra, Australian Institute of Criminology, 1993) 65; Eames G, 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, prevention and control* (Canberra: Australian Institute of Criminology 1993) 149. See also the discussion under Part VII 'Customary Law is No Excuse for Family Violence', below pp 357–59.

and Hannah McGlade argue in their background paper for this reference:

Any suggestion from the judiciary that Indigenous women may be afforded lesser standards of protection on the basis of custom is a tacit sanction to the continuing problems of family violence and treatment of Aboriginal women.¹⁵⁶

More recently arguments that family or domestic violence is generally acceptable within Aboriginal communities or permitted under Aboriginal customary law have been firmly rejected by courts.¹⁵⁷ There is continuing debate about cases of sexual offending against 'promised brides' under traditional law.

Promised brides

In the much published case *Hales v Jamilmira*¹⁵⁸ the Northern Territory Supreme Court of Criminal Appeal considered the issue of promised brides. In this case the 49-year-old Aboriginal accused was sentenced for an offence of carnal knowledge against his 15-year-old promised bride. A Supreme Court judge reduced the offender's sentence from 13 months' imprisonment (to be suspended after serving four months) to a sentence of 24 hours' imprisonment. The Court of Criminal Appeal increased the sentence to 12 months' imprisonment with the offender to be released after serving one month in prison.¹⁵⁹ Although it was accepted that the conduct of the accused was based upon practices considered by some Aboriginal people to be acceptable under Aboriginal customary law, the need to protect children was considered paramount.¹⁶⁰ It was also observed by Riley J that the behaviour in this case was more serious because the offender had a choice: although there may have been a degree of 'cultural pressure' there was no suggestion that the offender was required to have sexual relations with his promised wife.¹⁶¹

In *R v GJ*¹⁶² the court was presented with an argument that the accused had sexual relations with a girl aged 14 years because the victim was his promised wife. The accused pleaded guilty to an offence of having

sexual intercourse with the child and an offence of aggravated assault. Upon hearing accusations that his promised wife had engaged in sexual conduct with a young boy, both the accused and the victim's grandmother assaulted the victim as a form of punishment. The victim was forced to go with the accused and was again assaulted prior to the sexual conduct. Martin CJ accepted that the accused believed that he was entitled to have intercourse with the victim because she was his promised wife and had reached puberty. He also accepted (as did the Crown) that the accused believed that the victim had consented to sexual intercourse. In addition Martin CJ took into account that the accused did not know that he was committing an offence against the law of the Northern Territory.

Although the accused believed that his conduct was permissible under Aboriginal customary law, Martin CJ noted that it was not a case where customary law required that he have sexual intercourse or strike the child: in both cases the accused had a choice. Further, the sentencing judge made it clear that young Aboriginal girls are entitled to the protection of Australian law and he indicated his concern that some senior male members of the community believed they were entitled to force a promised wife to engage in sexual relations. The court sat at the Aboriginal community hoping to 'get the message through to all members of the community' that what the accused had done was wrong.¹⁶³ The accused was sentenced to two years' imprisonment to be suspended after serving one month in prison.

The public's concern for young Aboriginal girls is justified. The prosecution in each of these cases conceded that the sexual offence was consensual.¹⁶⁴ The sentencing courts were therefore required to proceed on that basis. While there are divergent views as to whether the actual sentences imposed were appropriate, the courts rightly considered aspects of Aboriginal customary law that indicated less moral blameworthiness. In particular, in *R v GJ* significant weight was placed by

156. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 41.

157. See for example *Jardurin v The Queen* (1982) 44 ALR 424; *R v Bulmer* (1986) 25 A Crim R 155; *Ashley v Materna* (Unreported, Supreme Court of the Northern Territory, No JA1/1997, Bailey J, 21 August 1997). For further discussion on this point see Part VII 'Customary Law is No Excuse for Family Violence', below pp 357–59.

158. [2003] NTCA 9.

159. The offender appealed, against the severity of the sentence imposed by the Court of Criminal Appeal, to the High Court of Australia. Special leave to appeal was refused. See *Jamilmira v Hales* [2004] HCAtTrans 18 (13 February 2004).

160. *Hales v Jamilmira* [2003] NTCA 9 [26] (Martin CJ).

161. *Ibid* [32] (Riley J).

162. (Unreported, Supreme Court of the Northern Territory, SCC 20418849, Martin CJ, 11 August 2005).

163. See *R v GJ* (Unreported, Supreme Court of the Northern Territory (Yarralin), SCC 20418849, Martin CJ, 11 August 2005) Transcript of Proceedings 5.

164. In both cases the prosecution charged the offender with an offence that did not allege that sexual relations had taken place without consent.

Martin CJ on the fact that the offender did not realise that he was committing an offence against the law of the Northern Territory. This is perhaps understandable given that the Northern Territory parliament previously allowed a defence to a charge of carnal knowledge if the accused and the alleged victim were traditionally married – this defence was only removed in early 2004.¹⁶⁵ As Martin CJ has subsequently stated, in the future when Aboriginal men who follow this aspect of traditional law become aware that this behaviour is contrary to the law of the Northern Territory, more severe penalties will be imposed.¹⁶⁶

In November 2005 the Crown appealed against the leniency of the sentence imposed in *R v GJ*. The Northern Territory Court of Criminal Appeal allowed the appeal on the basis that the sentence imposed on the accused was manifestly inadequate. The appeal court emphasised that the offences were objectively serious and that the conduct of the accused (although permissible under Aboriginal customary law) was not obligatory and the accused had not been under any pressure to commit the offences. Nonetheless, the court confirmed that when Aboriginal people commit an offence because they are acting in accordance with traditional Aboriginal law they may be less morally culpable. In this case the court noted that the traditional beliefs of the accused had already been taken into account by the decision not to charge him with an offence of sexual assault without consent. The court also took into account that in 2004 the maximum penalty for the offence of carnal knowledge was increased from seven years' imprisonment to 16 years' imprisonment.¹⁶⁷ The Court of Criminal Appeal substituted a sentence of 3 years 11 months' imprisonment to be suspended after serving 18 months in prison.

The Commission received no evidence to suggest that the practice of promised brides in Aboriginal communities in Western Australia is common.¹⁶⁸ In addition Western Australia has never recognised

traditional marriage as a defence to an offence of having sexual relations with a child under the age of 16 years.¹⁶⁹ Any arguments to a sentencing court suggesting that an Aboriginal offender did not know that sexual relations with an under-aged child is against the law of Western Australia would be unlikely to succeed.

The Commission's view

Although many of the cases discussed above refer to violence against women, it should be recognised that both Aboriginal men and women may be liable under customary law to traditional punishment and indeed, be responsible for the administration of that punishment.¹⁷⁰ In her background paper for this project, Catherine Wohlan observes that traditional violence as a form a punishment was the 'responsibility of whole communities or relevant groups in those communities, both women and men'.¹⁷¹ Wohlan distinguished this from what is sometimes referred to as 'bullshit traditional violence' which is not authorised by the community.¹⁷² For example, during the Commission's consultations in Warburton there was a great deal of concern about culturally offensive behaviour. This was described as swearing 'in a way that is deliberately disrespectful, insulting or offensive on matters of law, initiation or family' and distinguished from 'whitefella' type swearing.¹⁷³ Traditionally such behaviour may have resulted in severe punishment, including death. Aboriginal people (particularly men) were concerned that this was not properly understood when it resulted in violence against women.¹⁷⁴ In Mowanjun one Aboriginal woman said that when people are punished under Aboriginal customary law for 'wrong way' marriage this should not be viewed as physical abuse.¹⁷⁵

The Commission strongly condemns any suggestion that family violence or sexual abuse against Aboriginal women and children is justified under Aboriginal customary law. However, while the Commission accepts the potential for Aboriginal customary law to be incorrectly argued as an excuse for violent and sexual offending, this should

165. *Law Reform (Gender Sexuality and De Facto Relationships) Act 2003* (NT) s 5. During the second reading speech for this Bill the Northern Territory Attorney-General explained that although the defence based upon marriage applied on its face to all people, in fact since 1991 it was potentially only applicable to Aboriginal traditional marriages. This was because the *Marriage Act 1961* (Cth) does not generally permit marriage where one or both parties to the marriage is under the age of 18 years. See Northern Territory, *Hansard*, 15 October 2003.

166. Wilson A, 'DPP to Appeal Sentence in Elder's Child-Sex Case', *The Australian*, 20–21 August 2005, 9.

167. *R v GJ* [2005] NTCCA 20, [30], [32], [36], [39] (Mildren J, Riley & Southwood JJ concurring).

168. See separate discussions on this point in Part VII 'Traditional Aboriginal Marriage – Promised marriages', below p 332 and 'Customary Law Promised Marriages and Child Sexual Abuse', below pp 359–61.

169. *Criminal Code* (WA) s 321 (10).

170. For example in *R v Unchango* [1998] WASC 186 and *The State of Western Australia v Sturt* (Unreported, Supreme Court of Western Australia, No 5 of 2004, 1 September 2004) both offenders who were Aboriginal women were liable to traditional punishment for killing their partner.

171. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 35.

172. *Ibid*.

173. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 8.

174. *Ibid* 9.

175. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mowanjun*, 4 March 2004, 49.

The Commission strongly condemns any suggestion that family violence or sexual abuse . . . is justified under Aboriginal customary law.

not prevent courts from considering Aboriginal customary law. The common law suggests that such arguments would today be likely to fail. Further, due to the discretionary nature of sentencing, courts are able to balance Aboriginal customary law and international human rights standards that require the protection of women and children.¹⁷⁶ This is consistent with the proposal of the Commission in Part IV that 'Recognition of Aboriginal customary laws and practices in Western Australia must be consistent with international human rights standards and should be determined on a case-by-case basis'.¹⁷⁷

Aboriginal customary law as an aggravating factor

As discussed, an accused who has engaged in conduct that is permitted or required under Aboriginal customary law may be considered less blameworthy and as a result receive a more lenient penalty. The question arises: 'Can conduct that is prohibited under customary law be used to argue that an offence under Australian law is deserving of greater punishment?' For example, an Aboriginal offender may commit an offence of sexual assault against a person that the offender was prohibited from having contact with because of avoidance rules under customary law. While the offence of sexual assault would be viewed seriously by both Aboriginal people and non-Aboriginal people, this additional violation would make the offence more serious from the point of view of the offender's Aboriginal community. In general terms a sentencing court is entitled to take into account aggravating factors subject to the overriding principle that the sentence imposed must be proportionate to the offence committed.

The Commission's View

There is an abundance of judicial authority to support the consideration of Aboriginal customary law during

sentencing proceedings. The ALRC stressed in their 1986 report on Aboriginal customary laws that there was no support for the rejection of Aboriginal customary law as a relevant sentencing factor.¹⁷⁸ Therefore the obvious question that arises is whether there is any need of reform.

Aboriginal people consulted for this reference indicated strong support for greater recognition of customary law in sentencing. In the international law context it has been argued that:

In applying national laws and regulations to Indigenous peoples, States should pay due regard to their customs or customary law and should respect the methods customarily practised by Indigenous peoples in dealing with offences, including criminal offences, committed by their members.¹⁷⁹

Although it is difficult to know the extent to which Aboriginal customary law has been relied upon by defendants in Magistrates Courts, the ALRC concluded that it was usually argued in more serious cases of violence and homicide and less often for minor property or public order offences.¹⁸⁰ The ALRC recommended that it

should be provided in legislation that, where a person who is or was at a relevant time a member of an Aboriginal community is convicted of an offence, the matters that the court shall have regard to in determining the sentence to be imposed on the person in respect of the offence include, so far as they are relevant, the customary laws of that Aboriginal community, and the customary laws of any other Aboriginal community of which some other person involved in the offence (including a victim of the offence) was a member at a relevant time.¹⁸¹

The RCIADIC observed that 'the informal application by the criminal justice system of customary law has resulted in procedures which are ad hoc, idiosyncratic

176. For a general discussion of the need for a case-by-case approach by courts, see Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 75–76.

177. See Part IV, Proposal 5, above p 76.

178. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [516].

179. The United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities as quoted in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 52.

180. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [497].

181. Ibid [517].

to individual police or judicial officers, confusing to Aboriginal and non-Aboriginal people alike, and potentially open to abuse and over-statement or over-simplification'.¹⁸² In its 2000 report on the sentencing of Aboriginal offenders, the NSWLRC concluded that legislative recognition of Aboriginal customary law would 'promote consistency and clarity in the law and its application to Aboriginal people'.¹⁸³ It was also of the view that the recognition of Aboriginal customary law should not 'remain dependent upon individual judges and magistrates'.¹⁸⁴

It has been suggested that, because of the lack of policy direction through legislation, courts 'struggle' with the issues that arise under Aboriginal customary law.¹⁸⁵ Vincent has also stressed that there is no clear direction from the legislature or the courts as to how Aboriginal customary law is to be taken into account in sentencing.¹⁸⁶ He recommended that there should be a statutory requirement, for both adult and juveniles offenders, that sentencing courts must take into account an offender's cultural background and any Aboriginal customary law matters that are relevant.¹⁸⁷

Another reason for the need of reform is to encourage the legal system to view Aboriginal customary law more broadly. By requiring all courts to consider customary law, even for less serious offences (that do not result in physical traditional punishment), courts will be required to take into account the holistic nature of Aboriginal customary law and its potential to rehabilitate Aboriginal offenders.

It has also been argued that legislative recognition of Aboriginal customary law has 'symbolic significance' because it indicates respect for customary law.¹⁸⁸ The Commission considers that the recognition of Aboriginal customary law in sentencing should come from Parliament as well as the judiciary.

The single most important criticism of any legislative recognition of Aboriginal customary law is that it may result in a failure to protect Aboriginal women and children from violence and sexual abuse. The NSWLRC stated that:

Any proposal to recognise Aboriginal customary law in sentencing must carry with it a caution to distinguish legitimate and authentic customary law from false assumptions and misconceptions.¹⁸⁹

The Commission is of the view that the risk of false claims being made can be minimised by legislating about the manner in which evidence of Aboriginal customary law is presented during sentencing proceedings. This is a matter that is dealt with in detail below.

The common feature of the various suggestions for legislative recognition of customary law in sentencing is that courts should be required to consider Aboriginal customary law. This does not mean that when Aboriginal customary law is raised it will automatically lead to a reduced penalty. The Commission emphasises that courts will retain discretion and therefore can assess the appropriate weight that customary law should be given in any particular case. The NSWLRC concluded that it is not necessary for Aboriginal customary law to be defined in order for it to be recognised in sentencing legislation.¹⁹⁰ The Commission has already expressed its view that any codification of aspects of customary law is not appropriate.¹⁹¹

Proposal 31

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that when sentencing an Aboriginal offender a sentencing court must consider:

- any aspect of Aboriginal customary law that is relevant to the offence;
- whether the offender has been or will be dealt with under Aboriginal customary law; and
- the views of the Aboriginal community of the offender and the victim in relation to the offence or the appropriate sentence.

182. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [29.2.52].

183. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 93.

184. *Ibid.*

185. Sarre R, 'Sentencing in Customary Australia: An Overview of the Issues' in Sarre R & Wilson D (eds), *Sentencing and Indigenous Peoples*, Australian Institute of Criminology Research and Public Policy Series No 16 (1998) 12.

186. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 24–25.

187. *Ibid.*

188. NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 95.

189. *Ibid.* 104–105.

190. *Ibid.* 65.

191. See discussion under Part III 'Codification', above p 62.

Legislative recognition of Aboriginal customary law has 'symbolic significance' because it indicates respect for customary law

Evidence of Aboriginal Customary Law in Sentencing

For Aboriginal customary law to be properly taken into account as a relevant sentencing factor, it is vital that reliable evidence or information about customary law is presented.¹⁹² As provided by s 15 of the *Sentencing Act 1995* (WA) a sentencing court 'may inform itself in any way it thinks fit'. It is not bound by the strict rules of evidence that apply to a court when conducting a trial. There is a need to balance the requirement for reliable evidence about customary law and the flexible nature of sentencing proceedings.

References to false claims being made by Aboriginal people or their lawyers that an offender had been or would be subject to traditional punishment or that behaviour was permitted under Aboriginal customary law was a recurrent theme of the Commission's consultations.¹⁹³ For example, in Kalgoorlie it was said that a lawyer had submitted to the court that violence towards women was the 'Aboriginal way'; however, this argument was firmly rejected during consultations.¹⁹⁴ Overall, it was suggested that Aboriginal people, especially Elders, should be involved in the presentation of information to courts about Aboriginal customary law.¹⁹⁵

A number of principles can be extracted from the case law in regard to what evidence is required before a court can take Aboriginal customary law into account.

- Due to the diversity of Aboriginal customary laws credible evidence should be presented in every case.¹⁹⁶

- Statements from the bar table in the form of submissions from counsel are not sufficient.¹⁹⁷
- Wherever possible courts should sit in the relevant community because Aboriginal people are generally more comfortable giving evidence in their own community.¹⁹⁸
- At the very least, written evidence in the form of affidavits or statutory declarations should be presented with the prosecution being given an opportunity to consider whether the witness was required for cross-examination.¹⁹⁹
- It is generally preferable for the court to hear evidence from a representative group rather than from just one person.²⁰⁰
- Evidence about the nature of the traditional punishment and evidence that the punishment was, or will be, carried out in accordance with Aboriginal customary law is required.²⁰¹

In practice, information presented to sentencing courts about Aboriginal customary law has varied. Williams noted that courts have considered expert evidence or evidence from Aboriginal Elders; oral evidence from Aboriginal people; written statements from Aboriginal people; and submissions by defence counsel which have sometimes been accepted or verified by the prosecution.²⁰² The observation of Williams that Western Australian courts appear to be less strict in applying the above principles is an important matter for the Commission to consider.²⁰³ While there have been cases in Western Australia where information has come from Elders and other Aboriginal people, there are a significant number of cases where the information

192. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13; *Fitzroy Crossing*, 3 March 2004, 41.

193. In Broome it was said that some Aboriginal people have misled their legal representatives (and therefore the courts) about Aboriginal customary law: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23. In Geraldton it was noted that the prosecution need to be attentive when arguments based on customary law are presented to the court: see LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 16.

194. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27.

195. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 26.

196. *R v Jungarai* (1981) 9 NTR 30, 32 (Forster CJ).

197. *R v Minor* (1992) 59 A Crim R 227, 228 (Asche CJ).

198. *Munugurr v The Queen* (1994) 4 NTLR 63, [23].

199. *Ibid* [19].

200. *R v Wilson* (1995) 81 A Crim R 270, 275 (Kearney J). In this case three Aboriginal Elders gave their evidence together with the assistance of an interpreter.

201. *Mamarika v The Queen* (1982) 42 ALR 94; *R v Gordan* [2000] WASCA 401; *Parmbuk v Garner* [1999] NTSC 108.

202. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 9–13.

203. *Ibid* 9.

has been presented by defence counsel.²⁰⁴ For the purposes of illustration, in *R v Ryan*²⁰⁵ the Supreme Court of Western Australia was informed by defence counsel that the accused (who was convicted of the manslaughter of his brother) believed that he would be liable to traditional punishment in the form of spearing when he was released from prison. Defence counsel further stated that the accused wished to submit to traditional punishment and that it was likely to be inflicted by some 'elder members of the community'. There is nothing in the transcript of proceedings to suggest that the information came from anyone other than the accused himself.²⁰⁶ The sentencing judge remarked that in mitigation, as well as taking into account various other factors personal to the accused, he had considered the fact that the accused would probably be subject to traditional punishment.

The Commission considers that there are problems with this type of approach. Without corroboration from the relevant Aboriginal community that the offender will face traditional punishment, this approach runs the risk that a more lenient sentence may be imposed. The accused may not in fact be subject to traditional punishment at all or perhaps in a different manner than was presented to the court.²⁰⁷ On the other hand, less weight may be given in mitigation to unsubstantiated information from defence counsel in relation to an Aboriginal community's view of the offence and any relevant aspect of customary law.²⁰⁸ Of particular concern are cases involving violence or sexual offences against Aboriginal women (and children) if the information about customary law is presented from the viewpoint of the male offender.²⁰⁹ As Wohlan indicates in her background paper, when Aboriginal

customary law has been argued as an excuse for violence against women it is rare for the views of Aboriginal women to be considered by the courts.²¹⁰

It has been observed that courts have often looked to lawyers from Aboriginal legal services for advice about Aboriginal cultural and social factors, and the views of the Aboriginal community.²¹¹ One problem for defence counsel is the potential for a conflict of interest between the interests of the offender and those of the relevant community.²¹² Importantly, legal representatives have an obligation to present their client's instructions and present any arguments that may result in a more lenient sentence.²¹³ Vincent observes that in some cases it is difficult for an accused person or legal representative to produce evidence about Aboriginal customary law because of the secret nature of some aspects of customary law, as well as 'language and cultural differences or community isolation'.²¹⁴

The ALRC was of the view that while prosecuting counsel, defence counsel and pre-sentence reports were all appropriate methods for the court to be informed about Aboriginal customary law during sentencing proceedings, it is important to ensure that representatives from the relevant communities are given an opportunity to be heard.²¹⁵

The Commission is of the view that it is inappropriate for a court sentencing an Aboriginal offender to be informed about relevant customary law issues solely from defence counsel. This is not a criticism of defence counsel. Defence lawyers are limited by their professional obligations and also may be limited by a lack of resources to fund proper investigation into customary law issues.²¹⁶ In some cases the prosecution may accept

204. See *R v Friday* (Unreported, Supreme Court of Western Australia, No 146/1999, Templeman J, 13 October 1999); *R v Churchill* (Unreported, Supreme Court of Western Australia, No 160/1998, Scott J, 9 December 1999); *R v Gordan* [2000] WASCA 230 [18]; *R v Ryan* (Unreported, Supreme Court of Western Australia, No 229/2003, Miller J, 2 July 2004).

205. (Unreported, Supreme Court of Western Australia, No 229/2003, Miller J, 2 July 2004).

206. Ibid, Transcript of Proceedings 19.

207. Eames G, 'Aboriginal Homicide: Customary law defences or customary lawyers' defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, prevention and control* (Canberra: Australian Institute of Criminology, 1993) 149, 160.

208. Ibid.

209. Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 38.

210. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 37. It has been observed that while courts in the Northern Territory have been willing to hear evidence about customary law from Aboriginal men there has been less focus on the views of Aboriginal women. See Lloyd J & Rogers N, 'Crossing the Last Frontier: Problems facing Aboriginal women victims of rape in central Australia' in Eastaile P (ed), *Without Consent: Confronting Adult Sexual Violence* (Canberra: Australian Institute of Criminology, 1993) 159.

211. Eames G 'Aboriginal Homicide: Customary Law Defences or Customary Lawyers' Defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, Prevention and Control* (Canberra: Australian Institute of Criminology, 1993) 149, 150.

212. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [524].

213. Eames G 'Aboriginal Homicide: Customary law defences or customary lawyers' defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, Prevention and Control* (Canberra: Australian Institute of Criminology, 1993) 149, 154.

214. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 25.

215. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [531].

216. See discussion under 'Legal Representation', above pp 102–103.

the issues to be raised about customary law. For example, the prosecution may already be aware that traditional punishment has taken place or police may have taken statements from witnesses that contain information about Aboriginal customary law.²¹⁷

Northern Territory and Queensland have both enacted legislative provisions dealing with the reception of information about Aboriginal customary law. In 2005 the *Criminal Code* (NT) was amended to provide that a sentencing court may receive information in relation to an aspect of Aboriginal customary law (including punishment) and may take into account views of an Aboriginal community about the offence or the offender as long as the information is received from a party to the proceedings and is presented for the purpose of arriving at the appropriate sentence. The procedural requirements stipulate that the party who wishes to present the information must give notice to each of the other parties to the proceedings who in turn must be given a reasonable time to respond. The information must also be presented in the form of evidence on oath, an affidavit or a statutory declaration.²¹⁸ The Northern Territory Attorney-General, Dr Toyne, stated in relation to this legislation that:

If a person is going to make a claim about their rights to take some action under customary law or, in fact, if the community is going to make a claim about the inappropriateness of that person's actions according to customary law, that evidence really has to be tendered with a wider knowledge of the co-holders of customary arrangements than just simply the offender or their advocate, or the victim or their advocate. This is a collectively held system of living and needs to be tested in a wider context than just the claims of one individual to whatever end they are seeking at sentencing.²¹⁹

Section 9(2)(o) of the *Penalties and Sentences Act 1992* (Qld) provides that when sentencing an Aboriginal or Torres Strait Islander person a court must have regard to any relevant submissions made by a representative of the community justice group in the offender's community in relation to:

- the offender's relationship to his or her community;
- any cultural considerations; or
- any programs and services in which the community justice group participates.

For the purposes of this provision a community justice group is defined as one which has been formally established under the relevant legislation;²²⁰ a group of people within the offender's community who are involved in providing information to a court, or providing diversionary and rehabilitation activities for Indigenous people; or a group of people made up of Elders or other respected people. The provision applies to urban and rural communities. The legislation also states that a representative of a community justice group must advise the court if he or she is related to the offender or the victim or if there is a conflict of interest.²²¹ The same legislative provisions are contained in s 150 of the *Juvenile Justice Act 1992* (Qld).

The procedure that governs the receipt of information in Queensland is set out in Supreme Court Practice Direction No 5 of 2001. Submissions can be made in person, in writing or with the court's approval by telephone or video link. Generally submissions are made in person.²²² It has been argued that one deficiency in the practice directions is that there is no provision for the accused or the prosecution to be given any prior notice of the information that is to be presented to the court.²²³ In order to ensure that relevant information is presented to the court it has been suggested that written submissions should be provided to the defence counsel and the prosecution prior to the sentencing date.²²⁴ The Queensland Court of Criminal Appeal has held that a court is not bound to accept the submissions of a community justice group: the court is only bound to consider the submissions.²²⁵ A sentencing court therefore retains complete discretion as to the weight to be given to any submissions that are made to the court.

In order to retain flexibility in the sentencing process, the Commission does not consider that legislation should

217. See for example *R v Rictor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002): *R v Jackman* (Unreported, Supreme Court of Western Australia, No 250/2002, Murray J, 15 May 2003).

218. *Criminal Code* (NT) s 104A. The Northern Territory Attorney-General stated during the second reading speech of the Sentencing Amendment (Aboriginal Customary Law) Bill 2004 that the 'purpose of this bill is to ensure that courts are provided with fully tested evidence about relevant customary law issues when they are sentencing an offender': see Northern Territory, *Hansard*, 13 October 2004.

219. *Ibid.*

220. For a detailed discussion of community justice groups in Queensland, see 'Community Justice Mechanisms in other Australian Jurisdictions', above pp 127–29.

221. *Penalties and Sentences Act 1992* (Qld) s 9(7).

222. Hack S, 'Community-Based Sanctioning of Offenders: A New Solution for Indigenous Justice?' (2005) 30 *Alternative Law Journal* 24, 26.

223. West A, 'Criminal Law' (2001) 22 *Queensland Lawyer* 79, 85.

224. *Ibid* 86.

225. *R v Roberts* (Unreported, Supreme Court of Queensland, CA No 367/2001, Byrne J, 20 March 2002).

preclude particular types of information from being presented to the court. Instead, there should be a legislative provision that allows and encourages more appropriate and balanced methods of presenting evidence to a sentencing court.

Proposal 32

That the *Sentencing Act 1995* (WA) and the *Young Offenders Act 1994* (WA) should be amended by inserting the following provision:

That when sentencing an Aboriginal person the court must have regard to any submissions made by a representative of a community justice group²²⁶ or by an Elder or respected member of the Aboriginal community of the offender or the victim.

Submissions for the purpose of this section may be made orally or in writing on the application of the accused, the prosecution or a community justice group. The court sentencing the offender must allow the other party a reasonable opportunity to respond to the submissions if requested.

Sentencing Options

Diversionary Schemes

In the criminal justice system there are two types of diversionary options – those that divert offenders away from the criminal justice system and those that divert offenders away from more punitive sentencing options. The police generally control options that divert offenders from entering the criminal justice system: a choice is made whether to charge or to divert the alleged

offender. The role of police in diversion is considered below.²²⁷ The Commission examines in this section the potential for diversionary options for Aboriginal offenders in the sentencing context.

Restorative justice

Diversionary options are often based upon restorative justice practices which aim to repair the harm caused by the crime and generally involve the offender, the victim and the community.²²⁸ These include victim-offender mediation, conferencing and circle sentencing.²²⁹ In the past, conferencing models were considered to mirror Indigenous justice processes;²³⁰ however, this view has now been widely rejected.²³¹ Chris Cunneen contends that conferencing requires a face-to-face confrontation between the victim and the offender and that this may offend Indigenous dispute resolution processes.²³²

Diversionary conferencing schemes have also been criticised because they have been developed without adequate consultation with Indigenous communities and without sufficient consideration of the local needs of specific communities.²³³ The Commission has proposed the establishment of local Aboriginal community justice groups and is of the view that these groups could play an active role in diversionary justice options. The exact nature of that role will be dependent upon further community consultation and agreement.

Children

Juvenile Justice Teams

All Australian jurisdictions currently have some form of juvenile conferencing.²³⁴ In Western Australia, pursuant

226. A community justice group is defined as a community justice group as established by the proposed 'Aboriginal Communities and Community Justice Groups Act'.

227. See discussion under heading 'Police – Diversion', below pp 239–44.

228. Stubbs J, 'Restorative Justice, Domestic Violence and Family Violence' (2004) *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No 9, 1–2. For an overview of the development of restorative justice in Australia, see Daly K & Hayes H, 'Restorative Justice and Conferencing in Australia' (2001) 186 *Trends and Issues in Crime and Criminal Justice*.

229. Stubbs, *ibid* 2.

230. Polk K, Alder C, Muller D & Rechtman K, 'Early Intervention – Diversion and Youth Conferencing: A national profile and review of current approaches to diverting juveniles away from the criminal justice system' (National Crime Prevention, Commonwealth Attorney-General's Department, December 2003) 82. Conferencing for juveniles in New Zealand was introduced by the *Children, Young Persons and Their Families Act 1989* (NZ). One of the aims was to include elements of traditional Maori dispute resolution practices: see Strang H, 'Restorative Justice Programs in Australia: A report to the Criminology Research Council' (March 2001) 4.

231. Stubbs J, 'Restorative Justice, Domestic Violence and Family Violence' (2004) *Australian Domestic and Family Violence Clearinghouse*, Issues Paper No 9, 12; Polk et al, *ibid* 86; Blagg H, 'Aboriginal Youth and Restorative Justice: Critical Notes from the Australian Frontier' in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, mediation and circles* (Oxford: Hart Publishing, 2001) 230; Cunneen C, 'What are the Implications of Restorative Justice's Use of Indigenous Traditions?' in Zehr H & Toews B (eds), *Critical Issues in Restorative Justice* (New York: Criminal Justice Press and Willan Publishing, 2004) 341–49.

232. In some cases customary law sanctions are based on 'avoidance' such as banishment and temporary exile: see Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 310.

233. *Ibid* 293.

234. Polk K, Alder C, Muller D & Rechtman K, 'Early Intervention – Diversion and Youth Conferencing: A national profile and review of current approaches to diverting juveniles away from the criminal justice system' (National Crime Prevention, Commonwealth Attorney-General's Department, December 2003) 27.

There should be a legislative provision that allows and encourages more appropriate and balanced methods of presenting evidence to a sentencing court.

to the *Young Offenders Act 1994* (WA), a court can refer a young person to be dealt with by a juvenile justice team. The team will usually consist of a coordinator, a police officer, the offender, the victim (if he or she consents) and sometimes an education worker or a representative of the offender's ethnic community.²³⁵ At the team meeting participants will recommend an action plan. Successful completion of the action plan will mean that the offender does not receive a criminal conviction for the offence.²³⁶

When juvenile justice teams were established it was thought that they would operate as an effective diversionary option for Aboriginal juveniles.²³⁷ However, they have been under-utilised and when used have proved to be ineffective.²³⁸ The available evidence suggests that Aboriginal youth are referred less often than non-Aboriginal youth to juvenile justice teams.²³⁹ During a Commonwealth inquiry into Indigenous law and justice a representative of the Department of Justice claimed that research indicates that Aboriginal juveniles are now referred to juvenile justice teams as often as non-Aboriginal juveniles.²⁴⁰ Nevertheless it was acknowledged that Aboriginal juveniles come into contact with the criminal justice system at a much earlier age than non-Aboriginal juveniles.²⁴¹ This does not necessarily mean that Aboriginal juveniles commit more offences. Instead it may result from decisions by police

to formally process very young Aboriginal children when very young non-Aboriginal children may be released without any formal intervention or may not even come to the attention of police in the first place. Earlier involvement in diversionary options means that for any subsequent offending these children may lose the benefit of further diversion.²⁴²

In 2001 court conferencing, which operates in a similar manner to juvenile justice teams, was commenced. This option was only available in the metropolitan area for more serious offenders who are ineligible for referral to juvenile justice teams.²⁴³ Young Aboriginal offenders in regional locations are therefore disadvantaged by the lack of availability of this option.²⁴⁴

Another obstacle to the successful engagement of Aboriginal children and their families in the team process is fear and distrust of police and other government agencies.²⁴⁵ Despite the differences between conferencing models and formal court processes, conferences are still part of the juvenile justice system²⁴⁶ and therefore may not be seen as legitimate from the point of view of Aboriginal people.²⁴⁷

During the Commission's consultations there were calls for increased representation of Aboriginal people on juvenile justice teams.²⁴⁸ In 2005 the *Young Offenders*

235. *Young Offenders Act 1994* (WA) s 37(2).

236. *Young Offenders Act 1994* (WA) s 33(2).

237. Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 297.

238. Blagg H, 'A Just Measure of Shame: Aboriginal youth and conferencing in Australia' (1997) 37 *The British Journal of Criminology* 481, 496.

239. Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 297; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 174. The Commission notes that there is evidence that the rate of referral of Aboriginal youth to teams is improving: see Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 110, 116; Fernandez J & Loh N, *Crime and Justice Statistics for Western Australia: 2002* (Perth: Crime Research Centre, 2003) 119.

240. Commonwealth of Australia, Joint Committee of Public Accounts and Audit, *Indigenous Law and Justice Inquiry*, Official Committee, *Hansard* 31 March 2005, PA 29.

241. *Ibid.*

242. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 179.

243. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 89. Schedules 1 and 2 of the *Young Offenders Act 1994* (WA) contain lists of offences that cannot be referred to a juvenile justice team.

244. Morgan N & Motteram J, *ibid* 91.

245. Blagg H, 'A Just Measure of Shame: Aboriginal youth and conferencing in Australia' (1997) 37 *The British Journal of Criminology* 481, 496.

246. Polk K, Alder C, Muller D & Rechtman K, 'Early Intervention – Diversion and youth conferencing: A national profile and review of current approaches to diverting juveniles away from the criminal justice system' (National Crime Prevention Commonwealth Attorney-General's Department, December 2003) 58.

247. Blagg H, 'Aboriginal Youth and Restorative Justice: Critical notes from the Australian frontier' in Morris A & Maxwell G (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart Publishing, 2001) 231.

248. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 9; *Albany*, 18 November 2003, 17.

Act 1994 (WA) was amended to provide that the coordinator of the juvenile justice team could be a member of an approved Aboriginal community. For practical or cultural reasons, a warden, Elder or other appropriate member of an approved Aboriginal community could be included rather than a police officer.²⁴⁹ This is a positive development. The involvement of Aboriginal people in the team process will hopefully improve the effectiveness of juvenile justice teams for Aboriginal children.²⁵⁰

Diversion to a community justice group

Consultations indicated that there was an 'urgent need' for more effective diversionary options for Aboriginal youth²⁵¹ that deal with underlying problems and involve families.²⁵² Diversionary options that are managed or controlled by Aboriginal communities should be encouraged. Customary law processes as well as other programs or services established within Aboriginal communities will then be used in the rehabilitation of young offenders. This does not necessarily mean that representatives from government agencies cannot be involved. Some communities may develop programs in conjunction with police and justice officers, while others may consider the involvement of these agencies to be counter-productive. In all cases government support is required in developing and resourcing diversionary programs. In relation to community justice groups in Queensland funding and support from government was necessary to establish the groups, but the 'content and form of intervention is determined by the community'.²⁵³

The Commission is of the view that a court sentencing an Aboriginal young person should have the option of referring that person to an Aboriginal diversionary scheme. Section 67 of the *Young Offenders Act 1994* (WA) allows a court to dismiss a charge without imposing any punishment if the offender enters into an acceptable undertaking or has, or will be, subject

to an approved alternative form of punishment. The court also has the power to adjourn sentencing until such an undertaking or punishment has been carried out.²⁵⁴ The Commission's proposal in relation to the presentation of information to a court from a community justice group or respected member of the offender's community will assist in informing the court about relevant diversionary options.²⁵⁵ The sentencing court will of course have complete discretion in all the circumstances as to whether the option is appropriate.

The former Aboriginal and Torres Strait Islander Social Justice Commissioner outlined the best practice principles for juvenile diversionary options. Consistent with international human rights standards it was argued that diversionary schemes must incorporate procedural safeguards such as the presumption of innocence, the right to legal representation and the right to silence.²⁵⁶ A referral to a community justice group as a diversionary *sentencing* option will only occur after the offender has appeared in court and been convicted. The Commission also recognises the need for accountability and independent monitoring of any diversionary scheme.²⁵⁷ This applies equally to government-controlled and Aboriginal-controlled options. Where any offender is dealt with outside the formal court system there is a risk that unfair treatment will occur because the process may not be open and accountable.²⁵⁸ It may be necessary for an independent authority to hear complaints from offenders on their treatment while subject to diversionary schemes. Pilot schemes should be encouraged and monitored prior to any legislative amendments.

Adults

It is wrong to assume that restorative justice and diversionary programs are only suitable for young people or for less serious offending.²⁵⁹ Recently conferencing schemes have been introduced for adults in some

249. *Young Offenders Act 1994* (WA) ss 36 & 37. An appropriate member of an approved Aboriginal community is nominated by the community council and approved by the CEO of the Department of Justice and the Commissioner of Police.

250. For example, s 34(3) of the *Juvenile Justice Act 1992* (Old) provides that if the young person is an Aboriginal or Torres Strait Islander person the convenor of the conference must consider inviting a representative of a community justice group in the offender's community.

251. LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 16. In Midland it was said that diversionary options should be used to 'break the cycle of imprisonment': see LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 38.

252. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 22.

253. Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30 *The Australian and New Zealand Journal of Criminology* 292, 306.

254. *Young Offenders Act 1994* (WA) s 68.

255. See discussion under 'Evidence of Aboriginal Customary Law in Sentencing', above pp 221–24.

256. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 136.

257. *Ibid* 136–37.

258. In Strang H, 'Restorative Justice Programs in Australia: A report to the Criminology Research Council' (March 2001) 35, it was noted that there are risks associated with any informal justice process.

259. *Ibid* 27.

The underlying theme of this discussion is the need to increase the participation of Aboriginal people in the design and delivery of community-based sentencing options.

Australian jurisdictions.²⁶⁰ In 2002, as part of its proposed reforms to adult justice, the Department of Justice stated that adult conferencing would be introduced.²⁶¹ Apart from victim-offender mediation run by the Department of Justice there are currently no formal conferencing options for adults in Western Australia.²⁶² While conferencing or other restorative justice programs may be beneficial for all adult offenders, in the context of this project the Commission supports the use of Aboriginal-controlled diversionary options for adult Aboriginal offenders. This is a response to the disproportionate rate of Aboriginal imprisonment.

Under the current sentencing legislation, a court could consider referring an adult offender to a diversionary or restorative justice program in two ways. The first is by making a conditional release order under s 48 of the Act, which is essentially a bond to be of good behaviour for a set period of time, and it can be used to impose conditions upon the offender to attend diversionary programs established by an Aboriginal community.²⁶³ The second way that a court could refer an offender to a diversionary program is to adjourn sentencing until the program is completed. Section 16 of the Act allows the sentencing of an offender to be adjourned for up to six months. For a longer adjournment the court must impose a pre-sentence order under Part 3A of the Act. A pre-sentence order can only be imposed if the seriousness of the offence warrants a term of imprisonment.²⁶⁴ In order to provide for greater flexibility the Commission considers that a court sentencing an adult offender should have the power to adjourn sentencing for up to 12 months.

This should allow sufficient time for programs or processes to be decided upon and completed.

Proposal 33

That s 16 of the *Sentencing Act 1995* (WA) be amended to provide that:

The sentencing of an offender must not be adjourned for more than 12 months after the offender is convicted.

Community-Based Sentencing Options

The underlying theme of this discussion is the need to increase the participation of Aboriginal people in the design and delivery of community-based sentencing options.²⁶⁵ The Commission's consultations indicated extensive support for more effective and culturally appropriate sentencing options as well as increased involvement of Aboriginal people in the justice system. For example, in Midland it was stated that:

We need a different system of punishment that deals with Aboriginal people in a culturally appropriate way.²⁶⁶

The continuing over-representation of Aboriginal people in custody demands innovative action. Earlier in this Part the Commission has proposed the establishment of community justice groups. The purpose of this section is not to critically examine all available community-based sentencing options, but to consider

260. Ibid. Queensland has informal conferencing for adults run by the police. In the Australian Capital Territory restorative justice programs are available for adults: see *Crimes (Restorative Justice) Act 2004* (ACT) s 15. In Western Australian pilot restorative justice projects for adults have operated in Fremantle and Perth. The Statutes Amendment (Intervention Programs and Sentencing Procedures) Bill 2005 (SA) Clause 7 provides for a conferencing scheme for adult Aboriginal offenders. This proposed scheme stipulates that a conference may include an Aboriginal Elder. See also *Sentencing Act 2002* (NZ) s 8(j) which provides that a sentencing court is to take into account any outcomes of a restorative justice process. New Zealand has community managed restorative justice programs available for both juveniles and adults: see Paulin J, Kingi V & Lash B, *The Wanganui Community-Managed Restorative Justice Programme: An evaluation* (Wellington: Ministry of Justice, 2005) 22.

261. Department of Justice, *Reform of Adult Justice in Western Australia* (2002) 19.

262. Dot Goulding, Post Doctoral Research Fellow at the Centre for Social and Community Research, Murdoch University advised on 9 November 2005 that the previous restorative justice conferencing pilot (described as a 'communitarian model') was no longer in operation.

263. *Sentencing Act 1995* (WA) s 49(1) provides that a court can impose conditions on a conditional release order other than supervision by a community corrections officer. The court also has the power under s 50 to require that the offender re-appear in court to determine whether he or she has complied with the order.

264. *Sentencing Act 1995* (WA) s 33A(3). If a pre-sentence order is made the court can adjourn sentencing for up to two years: see s 33B.

265. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) Recommendations 104, 111, 113 & 116; NSWLRC, *Sentencing: Aboriginal Offenders*, Report No 96 (2000) 134.

266. LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 36.

the scope for community justice groups or other Aboriginal community justice mechanisms to be involved in sentencing orders.

Adults

Fines

Aboriginal people, especially women, continue to be imprisoned for fine default at a significantly higher rate than non-Aboriginal people.²⁶⁷ In 2003 Aboriginal women constituted 79 per cent of all female fine defaulters and 46 per cent of all Aboriginal women who were in prison were there because of fine default.²⁶⁸ Strategies have been introduced to reduce the level of imprisonment for fine default.²⁶⁹

In 2002 the Ngaanyatjarra Community identified specific problems relating to fines enforcement procedures for remote communities. For example, there was no person available in the community for an offender to apply to for a time to pay order under s 33 of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA).²⁷⁰ Further difficulties were experienced by members of that community because of a lack of education about how the fines enforcement system worked.²⁷¹

Section 57A of the Act allows an offender to apply to the court at the time a fine is imposed for a fine enforcement (WDO) order. The offender must show the court that they do not have the means to pay the fine, that other fines enforcement methods would be unlikely to result in the fine being paid and that they are capable of doing community work. This provision is important although it will not assist those people who cannot afford to pay the fine and, due to health or family issues, are unable to complete community work. It has been observed that community work orders are

difficult to manage in remote Aboriginal communities.²⁷² If the offender does not complete the community work then a warrant of commitment to prison can be ordered within seven days.²⁷³

During the Midland consultations the Commission was told that fines on Aboriginal offenders were often too high compared with the means of the offender.²⁷⁴ The Ngaanyatjarra Community has recommended that there should be a means test before a fine is imposed.²⁷⁵ However, s 53 of the Act provides that when determining the amount of a fine, a court should 'as far as practicable' take into account the means of the offender and the extent to which the fine will burden the offender. When deciding the amount to be imposed the option of converting a fine to community work should not be seen as a reason for ignoring the capacity of the offender to pay the fine. Further research is required into the extent that excessive fines are imposed on Aboriginal offenders.

Some of the practical enforcement problems could be solved with the involvement of community justice groups. With adequate resources an Aboriginal community justice group would be able to assist with community education about fines enforcement issues and possibly assist with the collection of fines and the supervision of community work and development orders.

Community work

The RCIADIC recommended that Aboriginal communities should participate in the planning and implementation of local community work programs that are of value to the community.²⁷⁶ Such programs are currently undertaken through the use of Community Service Agreements. The number of agreements in place at any given time varies and is subject to the conditions

267. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 17.

268. Fernandez J, Ferrante A, Loh N, Maller M & Valuri G, *Crime and Justice Statistics for Western Australia: 2003* (Perth: Crime Research Centre, 2004) 139.

269. The *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) was introduced to provide alternative non-custodial methods of enforcing fines. This legislation introduced the use of drivers licence suspension as an incentive to recoup unpaid fines. Although the intention of the legislation was to reduce the level of imprisonment for fine default there has been unintended consequences resulting from licence suspensions. Those who have continued to drive while suspended, often without knowing of the suspension have then received further fines as a result of the offence of driving whilst under suspension. Recently, the Department of Justice has introduced the *Time to Pay Up Strategy* which is designed to inform people who are not aware that their licences have been suspended and assist with more effective methods of making payments: see <<http://www.justice.wa.gov.au>> 'Fines and Infringements'.

270. Ngaanyatjarra Community, *Law and Justice Submission to the Attorney-General of Western Australia* (April 2002) 10.

271. Ibid.

272. Ibid 13.

273. Ibid.

274. LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37. In Laverton it was also stated that the system of fines and work and development orders do not work for Aboriginal people. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.

275. Ngaanyatjarra Community, *Law and Justice Submission to the Attorney-General of Western Australia* (April 2002) 15.

276. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [22.5.46] Recommendation 116.

of the community and the willingness of the community to supervise offenders.²⁷⁷

During the Warburton consultations suggestions were made as to how community-based sentencing options 'could be better used to reinforce community responsibility and respect for culture and law'.²⁷⁸ For example, it was proposed that community work could be set as a 'task' to be supervised by Elders.²⁷⁹ If the offender did not comply, Elders would be able to act more quickly than the community corrections officer.²⁸⁰

The Commission considers that it would be premature at this stage to suggest amendments to the Act to provide for a community service task in lieu of a set number of hours. Initially courts could consider imposing the completion of a community service task in the relevant Aboriginal community as a condition attached to a conditional release order. Alternatively the same result could be achieved as part of a diversionary process. In time and after further consultation with Aboriginal communities legislative amendments could be made.

Community-based orders

Aboriginal people generally have a higher breach rate for community-based orders than non-Aboriginal people.²⁸¹ While this is probably due in part to socio-economic disadvantages faced by many Aboriginal offenders, some of the blame must lie with the lack of suitable rehabilitative programs and services for Aboriginal offenders. In their background paper, Morgan and Motteram examined in detail the programs and services available in the community for Aboriginal offenders. They found, in general, that there are a very limited number of Aboriginal specific programs and services and many of those that exist are still in the developmental stage.²⁸²

An offender placed on a community-based order will usually require supervision. Generally this supervision is

undertaken by the local community corrections officer. In remote locations this is particularly difficult. One solution to this problem has been the use of Aboriginal Community Supervision Agreements between the Department of Justice and Aboriginal communities. Essentially Aboriginal people from the offender's community take over the supervision of the offender. As discussed earlier, these agreements may provide practical benefits in some communities. They do not allow for Aboriginal-controlled or customary law processes to be used.²⁸³

Supervision by a member of an Aboriginal community or community justice group could be facilitated through diversionary processes or by imposing conditions attached to a conditional release order. The broad nature of these options would allow customary law processes to operate. If community justice groups wish to have a direct role in the supervision of offenders on community based orders—instead of replacing community corrections officers through the use of Community Supervision Agreements—then amendments to the Act will be required.

Children

Community consultations revealed strong support for incorporation of aspects of Aboriginal customary law when sentencing young offenders. In Broome it was suggested that some young people who commit offences against both customary law and Australian law should be required to undergo education in traditional law as part of their sentence.²⁸⁴ In Wiluna 'bush camps' run by Aboriginal people were suggested as an alternative to imprisonment.²⁸⁵ In Rockingham one Aboriginal person said:

There should be 'culture camps' again for kids who get into trouble to teach children respect for their laws, land and people ... children should walk the old tracks again.²⁸⁶

277. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, Programs and Delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 70.

278. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 6.

279. *Ibid.*

280. *Ibid.* 7.

281. Auditor-General of Western Australia, *Implementing and Managing Community Based Sentences*, Report No 3 (May 2001) 50. See also Blagg H, Morgan N, Cunneen C & Ferrante A 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 14; Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.32].

282. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 128–29.

283. See discussion under 'Aboriginal Community Supervision Agreements', above pp 111–12.

284. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 22.

285. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 25.

286. LRCWA, Project No 94, *Thematic Summaries of Consultations – Rockingham*, 9 December 2002, 30. During the Commission's consultations with the ALS there was support for cultural camps for young people see LRCWA, Project No 94, *Thematic Summaries of Consultations – Aboriginal Legal Service of Western Australia*, 29 July 2003, 6.

Community supervision agreements are also in place for young offenders. Section 17B of the *Young Offenders Act 1994* (WA) provides that the Chief Executive Officer of the Department of Justice may enter into an agreement with the council of an Aboriginal community, with or without the assistance of a 'monitor', to supervise young offenders who are subject to community-based orders. A monitor may be appointed by the Chief Executive Officer from a panel of suitable persons nominated by the council of the relevant Aboriginal community.²⁸⁷

Once established, community justice groups would be able to supervise young offenders or provide specific programs in a more direct manner than currently operates. Instead of acting in the place of a community corrections officer, Aboriginal community supervision could be provided for in the legislation and ordered by the sentencing court.

The Commission's View

If a sentencing court is considering making an order that requires an Aboriginal offender to be supervised by members of an Aboriginal community or a community justice group or diverting an offender to be dealt with by their community, it is vital that the court is properly informed of the views of the community (or the community justice group). The ALRC was told of instances where courts had structured orders without first consulting the community.²⁸⁸ The Commission recognises that there may be some Aboriginal offenders who may not be welcome back to their community for a period of time and there may be some communities who are not willing to supervise some offenders.

The ALRC also observed that it may be inappropriate for courts to order that Aboriginal customary law punishments take place (irrespective of the legality of the punishment) because such punishments are not 'rule-governed' but are the 'result of a community process of dispute, discussion and reconciliation'.²⁸⁹ It is



important for judicial officers to be flexible in this area, focusing on the outcome of the process from the perspective of the offender, the victim and the community. Any sentencing order should provide for the involvement of the Aboriginal community without being unduly restrictive about the nature of that involvement. The court retains an overall monitoring role in this model by the requirement that the offender re-appear in court on a specified day to determine the final outcome, in the light of their response to the program or supervision.

The Commission has separately discussed the establishment of Aboriginal courts in Western Australia.²⁹⁰ Under the Commission's proposals in relation to sentencing, any court will be required to consider relevant Aboriginal customary law matters and the views of a community justice group. Aboriginal courts will facilitate this process and provide a space within the criminal justice system where all of those involved in the proceedings are fully aware of the issues.

287. *Young Offenders Act 1994* (WA) s17C.

288. ALRC, *The Recognition of Aboriginal Customary Laws*, Final Report No 31 (1986) [512].

289. *Ibid* [513].

290. See discussion under 'Aboriginal Courts – The Commission's View', above pp 156–57.

Practice and Procedure

Jurisdiction

Since European settlement Aboriginal people have been subject to Australian criminal law. For many Aboriginal accused, language and cultural barriers have made criminal proceedings 'alien and incomprehensible'.¹ In some cases it has been argued that Australian courts do not have the power to try an Aboriginal accused.² In *Walker v The State of New South Wales*³ Mason CJ rejected the plaintiff's argument that the criminal laws of New South Wales only applied to Aboriginal people to the extent to which they accepted those laws or consented to them. Mason CJ further stated that Aboriginal customary law had been extinguished by the passage of criminal legislation. Accordingly the criminal laws of each Australian state apply equally to Aboriginal and non-Aboriginal people.⁴ The Commission agrees that the protection of all Australians, including Aboriginal Australians, requires that all people are bound by the criminal law. Nonetheless, there are procedures within the criminal justice system that may operate unfairly against Aboriginal people and fail to adequately recognise Aboriginal customary law. In this section the Commission considers improvements to the practices and procedures of criminal justice.

Juries

The fundamental principle underlying a jury trial is the right of an accused to be judged by his or her peers.

Therefore, a jury should consist of people who are representative of the general community.⁵ Because jurors are selected at random there is no way of ensuring that when an Aboriginal person faces trial there will be Aboriginal people on the jury.⁶ Aboriginal people have been and continue to be under-represented as jurors. It has been observed that:

The blind refusal to acknowledge the fact that Aboriginal people rarely sit as jurors is one of the curiosities of Australian law.⁷

Some possible reasons for this under-representation are that there are less Aboriginal people on electoral rolls; there are problems associated with the service of jury notices; and there are long distances between remote areas and the local court.⁸ The view of one Aboriginal commentator is that even if he was selected as a juror he 'would seek to be excused' because of his distrust and alienation from the entire criminal justice system.⁹ It has also been noted that persons are not eligible to be jurors if they cannot understand English.¹⁰ In addition, Aboriginal people may also be excluded because they are challenged by lawyers who want a non-Aboriginal jury.¹¹

As a consequence of the under-representation of Aboriginal people on juries some accused have challenged the composition of the jury. This is known as a 'challenge to the array' and is based upon an argument that the officials have chosen an unrepresentative jury.¹² It has been observed that,

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1. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 258.
 2. Ibid.
 3. (1994) 182 CLR 45.
 4. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 1 (December 2003) 9. In 2005 it was again unsuccessfully argued before the High Court that Australian courts had no jurisdiction over Aboriginal people: see *Buzzacott v The Queen* [2005] HCA Trans 161.
 5. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Carlton: The Australian Institute of Judicial Administration, 2002) [7.3.2].
 6. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 38.
 7. Eames G, 'Aboriginal Homicide: Customary law defences or customary lawyers' defences?' in Strang H & Gerull S (eds), *Homicide: Patterns, prevention and control* (Canberra: Australian Institute of Criminology, 1993) 155.
 8. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Carlton: The Australian Institute of Judicial Administration, 2002) [7.3.5].
 9. Frankland R, 'Mr Neal is Entitled to Be an Agitator: Indigenous people put upon their country' in Auty K & Toussaint S (eds), *A Jury of Whose Peers? The Cultural Politics of Juries in Australia* (Perth: University of Western Australia, 2004) 50–57.
 10. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [589]. Section 5 of the *Juries Act 1957* (WA) provides that to be eligible as a juror a person must be enrolled on the electoral roll. If a person does not understand English or has certain criminal convictions he or she will be ineligible. During the consultations it was suggested that the electoral role for ATSIC (now disbanded) should be used to select juries: see LRCWA, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 16.
 11. LRCWA, *Thematic Summaries of Consultations – Aboriginal Legal Service*, 29 July 2003, 4. See also McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 260.
 12. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 260.

failing some defect in the process of summoning the jury pool, there is limited scope for any successful argument based on the lack of Aboriginal jurors.¹³

Jury Trials and Aboriginal People

The ALRC considered whether trial by jury is appropriate for traditional Aboriginal people.¹⁴ After reviewing early literature, which contended that Aboriginal people should not be subject to a trial before a jury, it concluded that there was no evidence to suggest that juries returned unfair verdicts to Aboriginal people.¹⁵ The Commission agrees with this view. It would be discriminatory to prevent an Aboriginal accused from exercising his or her right to a trial by jury. Where prejudice is a concern an Aboriginal person may seek a change of venue for the trial or apply for a trial by judge alone.¹⁶ In Western Australia an accused has the right to apply for a trial by judge alone and a court has the power to make such an order if it is in the interests of justice.¹⁷

Gender-Restricted Evidence

Gender-restricted evidence under Aboriginal customary law can cause problems for courts. Some matters under customary law can only be heard by men and some can only be heard by women.¹⁸ If, during a trial, relevant evidence concerned such restricted matters a mixed jury may preclude either the prosecution or the accused from calling evidence of that kind. In Western Australia the prosecution and the accused each have five peremptory challenges. After these challenges have been exhausted either party can challenge a juror on the basis that he or she is not qualified to act as a juror or is in some way biased.¹⁹ It would be virtually impossible for these challenges to result in a jury comprised of one gender.²⁰ There are two known cases

concerning gender-restricted evidence and customary law. In both cases the jury was comprised entirely of men; however, this was achieved by agreement between the prosecution and the defence.²¹ A court has no power to order that a jury is to be comprised of one gender.²²

The ALRC concluded that a court should have the discretion to empanel a jury of a particular gender provided that it was necessary to allow all relevant evidence to be heard.²³ The Commission agrees that where it is necessary for the proper conduct of the trial the court should have the power to order a jury to be comprised of a specific gender.

Proposal 34

That the *Criminal Procedure Act 2004* (WA) be amended by inserting s 104A as follows:

- (1) A court may order, upon an application by the accused or the prosecution, that the jury be comprised of one gender.
- (2) The court may only make an order under s 104A (1) if satisfied that evidence that is gender-restricted under Aboriginal customary law is relevant to the determination of the case and necessary in the interests of justice.

Fitness to Plead

Once a person is charged with an offence a preliminary issue may be whether the person is fit to stand trial. A person may be unfit to stand trial because of mental incapacity, physical incapacity or language difficulties.²⁴ Some Aboriginal people face cultural, language and communication barriers within the criminal justice system.²⁵ As a consequence an Aboriginal accused may

13. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [592]. See *R v Grant and Lovett* [1972] VR 423; *R v Walker* (1989) 2 Qd R 79.

14. ALRC, *ibid* [586].

15. *Ibid* [588].

16. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 260. Although not related to the composition of a jury, the venue of a trial has apparently been changed because of Aboriginal customary law considerations: see Malcolm CJ 'Aboriginal People and the Criminal Justice System' (Paper presented to the Aboriginal Pre-Law Program at the University of Western Australia Law School, 1995) 12.

17. *Criminal Procedure Act 1994* (WA) s 118.

18. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [595].

19. *Criminal Procedure Act 2004* (WA) s 104.

20. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 38. Although a one-gender jury has been achieved through the use of challenges: see McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 261.

21. See *R v Sydney Williams* (1976) 14 SASR 1; *R v Gudabi* (Unreported, Northern Territory Supreme Court, SCC No 85/82, Forster CJ, 30 May 1983).

22. *R v A Judge of the District Courts and Shelley, Ex Parte Attorney-General* (1991) 1 Qd R 170.

23. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [595]. Philip Vincent in his background paper for this project also recommended that the *Juries Act 1957* (WA) should be amended to permit a judge to order that a jury be comprised of persons of a particular gender: see Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 39.

24. *Eastman v The Queen* [2000] HCA 29, [59] (Gaudron J).

25. See discussion under 'Alienation from the Criminal Justice System', above pp 99–100.

not understand the proceedings, the nature of the charge or the consequences of a plea.

In *Ngatayi v The Queen*²⁶ the accused, who was charged with wilful murder, was described as a traditional Aboriginal man. It was argued that the accused was not fit to stand trial because he was incapable of understanding the proceedings and making a proper defence. The application was made pursuant to s 631 of the *Criminal Code* (WA) (now repealed). The accused wished to enter a plea of guilty and he did not understand the advice from his lawyer that because he was drunk at the time of the offence the prosecution may not be able to prove that he had an intention to kill. It was argued on behalf of the accused that in 'his law a man who kills is always guilty and there is no amelioration'.²⁷

The majority of the High Court held that the trial judge was correct to conclude that the accused was fit to stand trial. The majority referred to two situations that may cause an accused to lack capacity to understand the proceedings. Firstly, if the accused does not understand English then an interpreter may provide the remedy. Secondly, if the accused does not understand the relevant law—provided that he or she is able to understand the evidence and provide instructions to his or her lawyer—the presence of a legal representative would suffice.²⁸

In *Ngatayi v The Queen* the judge refused to accept the plea of guilty under s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) because the accused did not understand the consequences of a plea of guilty. The majority of the High Court considered that s 631 of the *Criminal Code* (WA) and s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) operated as a two-stage process. Before a plea was entered it must be determined whether the accused was fit to stand trial. If the accused was considered capable to stand trial and entered a plea of guilty, then s 49 came into operation.²⁹ Both of these provisions have now been repealed. It is therefore necessary to examine the current legislative provisions to determine whether

there is adequate protection for Aboriginal people who may be disadvantaged because of language and cultural barriers.

Fitness to Plead on the Basis of Mental Impairment

The *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) replaced s 631 of the *Criminal Code* (WA). This legislation only applies where an accused is unfit to stand trial by reason of mental impairment.³⁰ If the evidence suggests that the accused is not likely to be fit to stand trial within six months the accused may be kept in custody until released by the Governor.³¹ The ALRC considered that legislative provisions designed for the mentally impaired should not be used for Aboriginal people who do not understand the proceedings because of language or cultural barriers. It concluded that a plea of guilty should not be accepted if an Aboriginal accused is not fluent in the English language unless the court is satisfied that the accused understands the effect of the plea and the nature of the proceedings.³²

Fitness to Plead Because of Cultural or Language Barriers

Section 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) operated as a protective measure to overcome difficulties that may be experienced by Aboriginal people in terms of language and communication. It provided that, for an offence punishable by imprisonment, the court must refuse to accept a plea of guilty or a confession if satisfied that the accused was Aboriginal and did not understand the nature of the proceedings or the nature of the plea or confession. If the court decided that a plea of guilty could not be accepted then a plea of not guilty would be entered.³³ An examination was required under s 49 if the circumstances suggested the accused might be of Aboriginal descent and might lack the relevant understanding.³⁴

26. (1980) 30 ALR 27.

27. Ibid 29 (Gibbs, Mason & Wilson JJ).

28. Ibid 33.

29. Ibid 34.

30. Pursuant to s 8 of the *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) mental impairment is defined as intellectual disability, mental illness, brain damage or senility.

31. Where an accused is found unfit to stand trial the court has a discretion to dismiss the charge or make a custody order, see *Criminal Law (Mentally Impaired Defendants) Act 1996* (WA) ss 16(5) & 19(4).

32. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [585].

33. *Ngatayi v The Queen* (1980) 30 ALR 27, 34 (Gibbs, Mason & Wilson JJ).

34. *Green v The Queen* [2001] WASCA 162 [85] (Wheeler J), [58] (Wallwork J).



Section 49 was repealed in 2004. The relevant provisions are now contained in the *Criminal Procedure Act 2004* (WA). Unlike the previous section the provisions under the *Criminal Procedure Act* are not Aboriginal-specific. For matters dealt with in the Magistrates Court (either simple offences or indictable offences dealt with summarily) the court must be satisfied before requiring an accused to enter a plea that he or she understands the charge and the purpose of the proceedings.³⁵ As Philip Vincent observes in his background paper, there is no direction as to what the court should do if the accused does not understand the charge or the purpose of the proceedings.³⁶ For superior courts Vincent suggests that the power to stay a prosecution permanently, if it is in the interests of justice to do so, could be used where the accused is not fit to stand trial or to enter a plea.³⁷

In addition, s 129 of the *Criminal Procedure Act* sets out the procedure where an accused enters a plea of guilty. The provision applies to a Magistrates Court (dealing with a simple offence or an indictable offence that is to be dealt with summarily) and for any matter in a superior court. It does not apply to a plea of guilty entered in a Magistrates Court to a charge that must later be dealt with by a superior court.³⁸ A court must not accept the plea of guilty unless the accused is represented by a lawyer or if not represented the court is satisfied the accused understands the plea and its consequences. Vincent questions whether this new provision provides adequate protection for Aboriginal

people who are disadvantaged within the criminal justice system.³⁹ One important difference is that s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) covered pleas of guilty as well as an admission or confession made to police. The effect of this and the general issues concerning police interviews with Aboriginal people are dealt with below.⁴⁰

The potential problem arising from the new section is that because of its broad coverage specific cultural and language issues may be overlooked. On the other hand, the previous section had the potential to be viewed as offensive by inferring that only Aboriginal people were likely to have difficulties in understanding the court process. The current provision hinges upon whether a person is legally represented. Language and communication issues do not necessarily disappear because the accused has a lawyer. Where an accused is represented by a lawyer but appears to have language, cultural or communication difficulties one solution is the use of an interpreter.⁴¹ Where an accused is unrepresented the court could adjourn the matter until the accused can be represented and have access to the services of an interpreter. This matter is further discussed in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure'.⁴²

The Commission considers that the provision should be amended in order to direct courts to consider the reasons why Aboriginal people, as well as other ethnic or cultural groups, may not properly understand the nature and consequences of a plea of guilty.

Proposal 35

That s 129 of the *Criminal Procedure Act 2004* (WA) be amended by providing that for all accused persons:

The court must not accept a plea of guilty unless, having considered whether there are any language, cultural or communication difficulties, the court is satisfied that the accused understands the nature of the plea and its consequences.

35. *Criminal Procedure Act 2004* (WA) s 59 (2).

36. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 36.

37. *Ibid.* See *Criminal Procedure Act 2004* (WA) s 90.

38. This is presumably because once the accused appears in the superior court a further plea is entered. The superior court also has the power to refuse to accept a plea of guilty in this situation if satisfied that the plea that was made in the Magistrates Court was made under a 'material misunderstanding as to the charge, the plea or the purpose of the proceedings': see *Criminal Procedure Act 2004* (WA) s 99(5)(b).

39. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 36.

40. See discussion under 'Police Interrogations', below pp 244–50.

41. See discussion on Aboriginal language interpreters under Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–407.

42. *Ibid.*

Police

Historically, Aboriginal people have been subject to oppressive treatment by police. As stated by the RCIADIC:

Throughout the many decades when policies of protection, welfare, segregation or assimilation called for Aboriginal people to be controlled, confined or moved, often with great anguish, from areas of traditional attachment, or for their children to be taken away to their irreparable heartbreak, police were always involved.¹

The Western Australia Police Service has conceded that its 'relationship with Aboriginal people had suffered from historical legacies'. This has resulted in 'difficulty in building trust between police and Aboriginal people'.² The RCIADIC observed that Aboriginal people resent the excessive intervention in their lives by police and are hesitant to seek assistance from them.³ Similarly, the Gordon Inquiry found that one of the primary reasons for the reluctance of Aboriginal people to report family violence and child abuse was distrust of police.⁴

The RCIADIC made extensive recommendations about the criminal justice system, a substantial number of which were directed to police services.⁵ In general the RCIADIC recommended that the effectiveness of policing to Aboriginal communities should be reviewed with particular emphasis on whether there is over-policing or inappropriate policing of Aboriginal people.⁶

Because police have wide discretion about who to arrest and charge, as well as where to patrol and which

offenders will be targeted, they play a direct role in the over-representation of Aboriginal people in the system.⁷ It has been asserted that:

The police are arguably the criminal justice system's most significant decision makers. It is they who provide the first interface with the system and who are, in effect, its 'gate-keepers'. Police decisions – such as whether to intervene in a particular situation, whether to deal with a matter formally or informally, which charges to lay, and whether to proceed by way of arrest and charge or by summons – can have far reaching implications.⁸

The Commission holds the view that over-policing and inappropriate policing of Aboriginal people continues today. One of the most notorious examples of over-policing is the 'trifecta': drunkenness, obscene language and resisting arrest.⁹ Following the decriminalising of drunkenness the 'trifecta' now includes disorderly conduct, resisting arrest and assaulting a police officer.¹⁰ Many of the 'trifecta' charges eventuate because police approach Aboriginal people in public spaces for behaviour that would go unnoticed if committed by non-Aboriginal people.¹¹ As a consequence Aboriginal people react and this reaction escalates to the point where police decide to arrest.

Section 50 of the *Police Act 1892* (WA) provides that a police officer has the power to order that a person leave a public place for up to 24 hours if the officer reasonably suspects (amongst other things) that the person is committing a breach of the peace or intends to commit an offence. This section came into operation

1. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [13.3.6].
2. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 2.
3. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (1991) [5.12.3].
4. Gordan S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 207.
5. For a detailed consideration of the implementation of individual recommendations, see Government of Western Australia, *2000 Implementation Report of the Royal Commission into Aboriginal Deaths in Custody* (Aboriginal Affairs Department, June 2001).
6. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [21.2.46] recommendation 88.
7. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245.
8. Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 10.
9. Dillon C, 'Law Enforcement and Indigenous Australians' (Paper presented to the 3rd National Outlook Symposium on Crime in Australia: Mapping the Boundaries of Australia's Criminal Justice System, Australian Institute of Criminology, Canberra, 22–23 March 1999) 4.
10. Morgan N, 'The Abolition of Six-month Sentences, New Hybrid Orders and Truth in Sentencing: Western Australia's latest sentencing laws' (2004) 28 *Criminal Law Journal* 8, 15.
11. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 248. See also Mahoney D, *Inquiry into the Management of Offenders in Custody and the Community* (November 2005) [9.26].

in June 2005. Failure to comply with the order, without a reasonable excuse, is an offence and the penalty is a maximum of 12 months' imprisonment. More than 120 'move-on notices' were issued in the first two weeks that this provision came into operation. It has been reported that 36 per cent of these 'move-on notices' were issued to Aboriginal people.¹²

Examples of over-policing were given during the consultations. Aboriginal people informed the Commission that police officers sometimes target specific places to catch people driving under suspension.¹³ In Fitzroy Crossing it was stated that 'police "lie in wait" for Indigenous drivers, they don't stop white people when they come out [of] the pub'.¹⁴ In Laverton there were numerous comments about 'heavy handed tactics' by the police especially in relation to public arguments – 'Aboriginal people have nowhere to hide when drinking and arguing'.¹⁵

During the Commission's consultations it became clear that relations between Aboriginal people and the police are still extremely strained. Lack of respect for Aboriginal people generally and for Elders and community leaders were highlighted.¹⁶ Many Aboriginal people believe that there is extensive racism within the police service.¹⁷ Lack of sensitivity by police towards Aboriginal victims and lack of appropriate support for victims of family violence were also mentioned.¹⁸ Many communities commented that young Aboriginal people were treated poorly by police.¹⁹ A similar finding was made in 2002 by the former Aboriginal and Torres Strait Islander Social Justice Commissioner who reported that young Aboriginal people felt that they were 'targeted by police in public spaces'.²⁰ In some places it was claimed that police use excessive force against young Aboriginal people.²¹

In order to maintain law and order in Aboriginal communities, effective cooperation between Aboriginal

communities and the police is essential.²² The Commission's consultations revealed some support for working together to improve the relationship between police and Aboriginal people. In Fitzroy Crossing the need for consistency between police personnel was seen as a problem. It was said that when a new sergeant is appointed existing protocols developed between the local police and the community may be ignored.²³ In Warburton there were complaints that police fail to seek permission to come into the community or even advise the reason why they are there:

The police come – don't ask permission from the community and don't tell us the reasons. They say 'just open the door and let us in'. We are still waiting to work properly with the police.²⁴

The Commission acknowledges that there are many police who 'work well with Aboriginal communities on a basis of mutual respect and trust'.²⁵ However, in order to improve the status of police-Aboriginal relations and to ensure more effective policing of Aboriginal communities, reform is necessary.

Police and Aboriginal Customary Law

The Policy and Practice of the Western Australia Police Service

A difficult issue confronting police officers in their dealings with Aboriginal people is the appropriate response to physical traditional punishment that may constitute an offence under Australian law. There are two important issues – whether police should 'allow' physical traditional punishment to take place and whether police should lay charges against a person who has inflicted traditional punishment pursuant to Aboriginal customary law.

12. Morfesse L, 'Youth Targeted in New Orders to Move Along', *The West Australian*, 13 June 2005, 11.

13. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 14.

14. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 43.

15. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.

16. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42; *Derby*, 4 March 2004, 52.

17. LRCWA, *Thematic Summaries of Consultations – Derby*, 4 March 2004, 53; *Mowanjun*, 4 March 2004, 49.

18. LRCWA, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37; *Broome*, 17–19 August 2003, 29; *Fitzroy Crossing*, 3 March 2004, 43; *Derby*, 4 March 2004, 53.

19. LRCWA, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July, 2003, 6; *Broome*, 17–19 August 2003, 21; *Mirraboopa*, 4 November 2002, 14; *Albany*, 18 November 2003, 19.

20. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 179.

21. LRCWA, *Thematic Summaries of Consultations – Derby*, 4 March 2004, 53.

22. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [214].

23. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 43.

24. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 7.

25. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 29. For example during the Commission's consultations in Wiluna the community showed support for their local sergeant: see LRCWA *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.

During the Commission's consultations Aboriginal people indicated that when an Aboriginal person has committed an offence against Australian law and has also contravened customary law it is vital that customary law processes take place first.²⁶ Physical traditional punishment under customary law is often required when an Aboriginal person is involved in the death of another Aboriginal person. If the offence is murder or manslaughter under Australian law, once the accused is arrested by police it is extremely unlikely that he or she will be released on bail prior to appearing in court.²⁷

The decision by a police officer to arrest an accused prior to traditional punishment taking place may have dire consequences for the accused, the accused's family and the relevant Aboriginal communities. As discussed earlier, if the accused is not available for punishment a member of their family may be punished instead. The failure of traditional punishment to take its course can also cause disharmony in communities and in some cases lead to ongoing conflict or feuding. An accused who is not punished under customary law may spend a number of years in prison wondering whether family members are suffering or if upon release they will still be punished.²⁸

The Western Australia Police Service *Strategic Policy on Police and Aboriginal People* emphasises that 'violent aspects of customary law' are inconsistent with Western Australian criminal law and contravene international human rights standards.²⁹ On the other hand, it is recognised that there are positive features of non-violent aspects of Aboriginal customary law, such as maintaining the 'social structure of Aboriginal communities'.³⁰ This policy states that:

The Police Service will pursue charges relating to the carrying out of violent aspects of customary law and

will also support witnesses and protect them from retribution.³¹

The police (as well as the prosecuting agencies) have discretion whether or not to charge an alleged offender. It appears that in practice police officers do not often charge Aboriginal people for inflicting traditional punishment and in some cases police officers are actually present when the punishment takes place.³² It has been observed that despite the overall discriminatory use of police discretion against Aboriginal people, the instances where police and prosecuting authorities have exercised their discretion in favour of Aboriginal people has usually been in relation to matters connected to Aboriginal customary law.³³

A sergeant at Wiluna Police Station reportedly said that police probably wouldn't proceed to charge a person for inflicting traditional punishment if the complainant (the person punished) did not wish to pursue the matter.

Often the police attempt to overlook tribal punishment so long as the consequences or injuries are not too severe.³⁴

In 2001 a senior constable working in Kalgoorlie intervened to help an Aboriginal man after traditional punishment was at an end. The police officer assisted the man, who had been beaten and speared, to his feet. Once the members of the community saw that the man could walk he was speared a further 10 times. It was submitted during the sentencing proceedings (of the man who was tribally punished) that 'one of the purposes of traditional punishment is to disable to the point that the person cannot walk nor get off the ground'.³⁵ The police officer was quoted in *The Australian* newspaper as saying: 'I knew what was going to happen, I had to let it happen'.³⁶

26. The relevance of customary law to decisions regarding bail has been considered separately. See discussion under 'Traditional Punishment and Bail', above pp 198–201.

27. Ibid.

28. Ibid.

29. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10. As discussed above in Part IV (above pp 67–76) and in the present Part under 'Consent' (above pp 163–72), the question whether traditional punishments under Australian Aboriginal customary law will contravene international human rights standards is undecided. As stressed in Part IV, there are many customary law practices, including some traditional punishments, that will not contravene such standards.

30. Ibid.

31. Ibid.

32. In recent years the only case known to the Commission (in a superior court) where an Aboriginal person has been charged with an offence resulting from the infliction of traditional punishment is *R v Judson* (Unreported, District Court of Western Australia, POR No 26/1995, O'Sullivan J, 26 April 1996): see discussion under 'Consent', above pp 163–72. A number of sentencing cases indicate that the police were either present during the punishment or were at the very least aware of it. See for example *R v Njana* (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998); *R v Richtor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002); *R v Nelson* [2003] NTSC 64 (4 June 2003).

33. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 245–46.

34. Hottwagner H, 'Two Rules of Law, Payback or Whiteman's?', *eMU News Online*, 29 April 2005 <<http://emunews.murdoch.edu.au/crime26.htm>>.

35. *R v Richtor* (Unreported, Supreme Court of Western Australia, No 34/2002, McClure J, 30 April 2002) 20.

36. Laurie V, 'Justice in Black and White', *The Weekend Australian*, 20–21 October 2001, 20.

In *R v Njana*³⁷ the Supreme Court of Western Australia heard evidence from a detective that the police were aware that traditional punishment had been decided by the Elders and that they were powerless to prevent it. It appears that the police made the decision to wait until after traditional punishment had ended before arresting the accused because they were concerned for their own safety if they tried to intervene.³⁸

The Commission's consultations also indicated the divergence between practices of police in different locations and at different times. In the Pilbara it was stated that in the past the police would 'sanction' traditional punishment. It was said that police would consult with Elders and release 'guidelines' about the degree of injury that would be permitted.³⁹ In Broome it was contended that there was 'guarded support for traditional punishment by some police officers'.⁴⁰ The potential of liability for police officers if the punishment went wrong was acknowledged.⁴¹ During the consultations in Bandyup Prison it was stated that the police in Kalgoorlie knew that they should not interfere with traditional punishment and would 'take men back for punishment, then to jail'.⁴²

Aboriginal people consulted by the Commission in Laverton resented the fact that police had taken certain people, who were liable to face traditional punishment, away before there was a chance for customary law processes to take place.⁴³ In Fitzroy Crossing, Aboriginal respondents criticised police who refused to grant bail for an offender who was liable to traditional punishment. They stated that the police do not understand that family members will be punished if the offender is not available.⁴⁴

Despite these very real concerns the Commission does not consider that it is appropriate to recommend that police officers should in any way facilitate the infliction of unlawful violent traditional punishment.

Discretion to Charge or Prosecute

The decision to charge or prosecute an Aboriginal person, for an offence against Australian law that occurred because the conduct giving rise to the offence was required under Aboriginal customary law, is a different matter. The ALRC found that, apart from discretionary decisions during sentencing proceedings, recognition of Aboriginal customary law had occurred principally in the use of police or prosecutorial discretion. Where offences are based upon customary law, decisions are sometimes made not to charge a person or to substitute a less serious offence.⁴⁵ It was observed that in some cases the decision not to charge may have been influenced by the fact that the complainant did not wish to proceed.⁴⁶

In Western Australia, prosecutorial guidelines require that a prosecution must be in the public interest.⁴⁷ Some of the factors set out in the prosecutorial guidelines could be applicable to offences committed in circumstances involving Aboriginal customary law. These include the attitude of the victim, the degree of culpability of the alleged offender and whether there are available alternatives to a prosecution.⁴⁸ The guidelines for police in the *Commissioner's Orders and Procedures Manual (COPs Manual)* in relation to charging are more limited than those for decisions about whether to continue a prosecution. Although public interest is a relevant factor it is stated that for indictable offences, and in the absence of specific legislation such as the *Young Offenders Act 1994 (WA)*, police officers should bring charges if there is sufficient credible evidence.⁴⁹

The ability of prosecutorial guidelines to cover situations involving customary law is constrained by the express directive that when considering the question of public interest the 'race, colour, ethnic origin, sex, religious beliefs, social position, marital status, sexual preference, political opinions or cultural views of the alleged offender' are not to be taken into account.⁵⁰ The ALRC

37. (Unreported, Supreme Court of Western Australia, No 162/1997, Scott J, 13 March 1998).

38. Ibid 46.

39. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 8.

40. LRCWA, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.

41. Ibid.

42. LRCWA, *Thematic Summaries of Consultations – Bandyup Prison*, 17 July 2003, 6.

43. LRCWA, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 14.

44. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 42.

45. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [471].

46. Ibid [472].

47. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No 23, 7; Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-28.1.6.

48. Office of the Director of Public Prosecutions, *ibid*, Policy Guideline No 31, 9; Western Australia Police Service, *ibid*.

49. Western Australia Police Service, *ibid*, DP-1.1.1.

50. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No 33, 10; Western Australia Police Service, *ibid*, OP-28.1.6.

considered the benefits of specific prosecutorial guidelines for cases involving Aboriginal customary law. It observed that although guidelines are unenforceable they would at least direct police officers and prosecutors to take into account customary law when making a decision.⁵¹ Philip Vincent has also suggested that prosecutorial guidelines should include relevant matters under Aboriginal customary law.⁵²

In the same way that customary law may be relevant to sentencing⁵³ there is no reason in principle to prevent a prosecuting agency from considering customary law when making a decision to continue a prosecution. If customary law provides significant mitigation it may be appropriate not to prosecute. Of course, the decision will have to balance the seriousness of the offence against customary law considerations.

The ALRC recommended that the following factors should be included in guidelines concerning cases where Aboriginal customary law provides significant mitigation for an offence and the relevant Aboriginal community has resolved the matter:

- If the offence has been committed in circumstances where there is 'no doubt that the offence had a customary law basis'.
- Whether the accused knew that he or she had committed an offence against Australian law.
- Whether the matter had been resolved by the relevant Aboriginal community or communities through customary law processes and the community or communities do not wish for the matter to proceed.
- If the victim of the offence does not wish the matter to proceed.
- Whether there are alternatives such as diversion available.
- If the public interest would not be served by prosecuting the offence.⁵⁴

The Commission agrees with the substance of these factors but it does not consider that guidelines should be limited only to offences that are based on customary law. For example, an Aboriginal person may have committed an offence that is not a violation of customary law itself (such as burglary or alcohol related

offensive behaviour) and the Aboriginal community may have already invoked customary law processes, such as banishment or cultural shaming, to deal with the offender.

The decision not to charge or not to pursue a prosecution must take into account customary law in its broadest sense if there is to be effective diversion away from the criminal justice system for Aboriginal people. The Commission notes that the Western Australia Police Service *Strategic Policy on Police and Aboriginal People* recognises the positive benefits of non-violent customary law processes.⁵⁵ The Commission is of the view that this policy should be formally recognised in the guidelines for both police and prosecuting authorities to encourage greater diversion to Aboriginal community justice mechanisms.

Proposal 36

That the Western Australia Police Service *COPs Manual* OP-28 be amended to require relevant Aboriginal customary law issues to be taken into account in the decision to charge or prosecute an offender.

That the Director of Public Prosecutions consider amending the *Statement of Prosecution Policy and Guidelines 2005* to include that any relevant Aboriginal customary law issues should be taken into account in the decision to prosecute an offender.

Diversion

Diversionary measures aim to redirect offenders away from the formal criminal justice system or, alternatively, away from more punitive options such as imprisonment. The Commission has discussed court diversion in the section on sentencing.⁵⁶ This section focuses on diversion from the criminal justice system. Because of the primary role of police in deciding who enters the criminal justice system the discussion is focused on ways of achieving greater diversion rather than analysing the existing diversionary options.⁵⁷ The relationship

51. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [473] & [475].

52. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 32.

53. See discussion under 'Aboriginal Customary Law and Sentencing', above pp 212–24.

54. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [478].

55. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: A strategic approach to working with Aboriginal people in providing equitable and accessible policing services – policy statement and rationale* (2004) 10.

56. See discussion under the 'Sentencing Options', above pp 224–30.

57. For a discussion of the various diversionary schemes operating in Australia, see McDougall J & Lam H, 'Sentencing Young Offenders in Australia' (2005) 86 *Reform* 39; National Crime Prevention, *Early Intervention: Diversion and youth conferencing* (Commonwealth Attorney-General's Department, 2003).

between diversion to an Aboriginal community justice group and the role of police is also considered.

The best way to enhance community safety in the long-term is to prevent young offenders from entering the criminal justice system.⁵⁸ The Western Australian Office of the Director of Public Prosecutions, in the *Statement of Prosecution Policy and Guidelines 2005*, acknowledges that special considerations apply to the prosecution of juveniles. It is stated that

The longer term damage which can be done to a juvenile because of an encounter with the criminal law early in his or her life should not be underestimated.⁵⁹

This principle is also recognised in s 7(g) of the *Young Offenders Act 1994* (WA) which provides that non-judicial proceedings for young offenders should be considered providing it would not jeopardise the safety of the community.

Aboriginal juveniles have generally been referred by police to diversionary options less often than non-Aboriginal juveniles.⁶⁰ The RCIADIC recommended that legislation and police standing orders should be reviewed to ensure that Aboriginal juveniles are not arrested in circumstances where they could be cautioned or given a notice to attend court.⁶¹ Although there are some legislative and policy guidelines in relation to police diversion it has been observed that the emphasis is on 'may' rather than 'must' and that police do not consider that they are bound by police guidelines.⁶²

The following case provides a useful example of the problems that can occur when a young person is not given the benefit of diversionary options. In May 2005 a young Aboriginal boy from Onslow was detained in custody for 12 days for attempting to steal an ice-cream. After being arrested by a police officer and refused bail, the boy was driven in police custody for 300 kilometres to Karratha where he spent the night in the Karratha police station.⁶³ After appearing before two justices of the peace he was remanded in custody and taken by aeroplane to a Perth juvenile detention centre (at a cost to the public purse of \$10,000).

Although the young boy was subject to a conditional release order (in respect of a previous offence) imposed by the President of the Children's Court, it was stressed by his defence counsel that the police failed to exercise their discretion in the boy's favour in a number of ways: he was arrested rather than served with a notice to attend court; he was remanded in custody rather than being released on bail; and he was formally charged rather than cautioned or referred to a juvenile justice team – all for an offence that does not include imprisonment as a penalty.⁶⁴ When he was finally dealt with by the President of the Children's Court in Perth the boy was released with no further punishment.⁶⁵

Current Diversionary Options for Juveniles

Cautions

There are various options open to the police when dealing with a young person who they believe has committed an offence. Before commencing formal proceedings, a police officer must consider whether it would be more appropriate to take no action or administer a caution.⁶⁶ A caution is a warning to the young person about the allegedly unlawful behaviour. The legislation states that a caution should be preferred to formal proceedings unless, because of the number of previous offences or cautions and the seriousness of the offence, it would be inappropriate.⁶⁷ A caution cannot be given for any offence that is listed in Schedule 1 or Schedule 2 of the *Young Offenders Act 1994* (WA).

In Western Australia a caution can only be administered by a police officer. Due to the level of animosity felt by Aboriginal children towards police it is unlikely that a caution issued by a police officer would be as effective as a caution given by an Aboriginal person with cultural authority. In Queensland, New South Wales and Tasmania a caution may be administered to a young Aboriginal person by an Elder or a respected member of the young person's community.⁶⁸ The Commission is

58. Jackson H, 'Juvenile Justice – The West Australian Experience' in Atkinson L & Gerull S (eds), *National Conference on Juvenile Justice* (Canberra: Australian Institute of Criminology, 1993) 86.

59. Office of the Director of Public Prosecutions, *Statement of Prosecution Policy and Guidelines 2005*, Policy Guideline No 34, 10.

60. See discussion under 'Aboriginal People and the Criminal Justice System – Police Diversion of Juveniles', above p 96.

61. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [30.2.18], recommendation 239.

62. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 177.

63. The Commission notes that recommendation 242 of the RCIADIC stated that apart from exceptional circumstances juveniles should not be detained in police lock ups: see RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [30.6.1].

64. The maximum penalty for an offence of stealing (or attempted stealing) where the property involved is valued at less than \$1,000 is a fine of \$6,000: see *Criminal Code* (WA) s 426.

65. Banks A, 'Boy Jailed for an Ice-cream', *The Australian*, 4 June 2005.

66. *Young Offenders Act 1994* (WA) s 22B.

67. *Young Offenders Act 1994* (WA) s 23.

68. *Young Offenders Act 1997* (NSW) s 27(2); *Juvenile Justice Act 1992* (Qld) s 17; *Youth Justice Act 1997* (Tas).

Aboriginal juveniles have generally been referred by police to diversionary options less often than non-Aboriginal juveniles.

of the view that a similar provision would be effective in Western Australia.

Proposal 37

That Part 5, Division 1 of the *Young Offenders Act 1994* (WA) be amended to provide that police officers must consider, in relation to an Aboriginal young person, whether it would be more appropriate for the caution to be administered by a respected member of the young person's community or a member of a community justice group.

Previous cautions do not prevent a police officer from issuing a subsequent caution. Nevertheless, a young person's history of previous cautions and diversions is relevant to the decision of a police officer to further caution or divert the young person. The *COPs Manual* provides that a police officer may issue subsequent cautions if there is a lapse of time between offences or if the offence is of a minor or different nature.⁶⁹ Although the *COPs Manual* directs a police officer to establish that there is sufficient evidence that the young person committed the offence before deciding to issue a caution, the young person does not have to admit the offence or consent to the caution. The *COPs Manual* provides that previous cautions issued to the young person can be included in the instructions to the prosecutor and used in court if required.⁷⁰ It has been observed that in Western Australia a practice has developed in the Children's Court where the police prosecutor refers to the number of previous cautions and referrals to a juvenile justice team.⁷¹ The Commission finds it unacceptable that a diversionary option that does not require any proof or admission of guilt is subsequently used against a young person in court.

A solution would be to provide that a caution can only be administered if the young person accepts responsibility for the offence and consents to being

cautioned.⁷² Many Aboriginal children—given the state of their relationship with police—would be unlikely to consent or admit guilt without adult support or legal advice. As a consequence of not accepting responsibility or consenting, Aboriginal children would be charged instead. This would only increase the high levels of Aboriginal children being dealt with formally in the criminal justice system. The preferable option is to ensure that a previous caution cannot be used or referred to in all proceedings before a court.

Proposal 38

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous cautions issued under this Act cannot be used in court against the young person.

Juvenile justice teams

The legislative provisions dealing with juvenile justice teams expressly acknowledge that, where a young person has committed an offence that is not part of a 'well-established pattern of offending', it is important to avoid exposing the young person to negative influences and it is preferable to encourage the young person's family or other group to assist in dealing with the behaviour.⁷³ A young person must accept responsibility for the offence and agree to be dealt with by a juvenile justice team.⁷⁴ Recent amendments to the *Young Offenders Act 1994* (WA) which allow the involvement of Aboriginal Elders in the team process have been discussed earlier.⁷⁵

Section 29 of the *Young Offenders Act 1994* (WA) provides that, if the young person has not previously offended against the law, the discretion to refer to the juvenile justice team is to be exercised in favour of referral. The Full Court of the Supreme Court of Western Australia held that this section does not require that every first offender (for non-schedule offences) *must*

69. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.1

70. Ibid, OP-24.1.3.

71. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2002) 183.

72. *Juvenile Justice Act 1992* (Qld) s 16. But note that s 15(3) also provides that a caution is not part of the child's criminal history.

73. *Young Offenders Act 1994* (WA) s 24.

74. *Young Offenders Act 1994* (WA) s 25.

75. See discussion under 'Sentencing Options – Juvenile Justice Teams', above pp 224–26.

be referred to the juvenile justice team.⁷⁶ The Commission notes that the recently passed *Youth Justice Act 2005* (NT) provides that referral to a diversionary option *must* take place unless the offence is a prescribed serious offence or the history of the young person including previous diversions makes it an unsuitable option.⁷⁷ The Commission considers that there should be a stronger direction that requires diversion to a juvenile justice team unless there are exceptional circumstances. In this context, exceptional circumstances may include that the circumstances of the offence are very serious or there are a large number of offences at the one time. Where the young person does not comply with the requirement of the team or any participant of the team does not agree to the proposed action plan the matter will be referred to the court.⁷⁸

Proposal 39

That Part 5, Division 2 of the *Young Offenders Act 1994* (WA) be amended to provide that, subject to the young person's consent and acceptance of responsibility for the offence, a police officer must refer a young person to a juvenile justice team for a non-scheduled offence if the young person has not previously offended against the law, unless there are exceptional circumstances that justify not doing so.

In determining whether a young person has previously offended against the law, previous cautions cannot be taken into account.

The Commission also considers that the categories of offences that are excluded from the operation of juvenile justice teams are unduly restrictive. Certain 'scheduled' offences cannot be referred to juvenile justice teams.⁷⁹ Although for the most part these offences are serious, this is not always the case. For example, an offence of selling or supplying a prohibited drug cannot be referred to a juvenile justice team (and also cannot be the subject of a caution). A young person may commit this offence by sharing cannabis with his or her friends. Similarly an offence of assaulting a police officer cannot be referred. Although assaulting a police officer is generally considered to be a serious

offence, in some cases (such as where an offender lightly pushes a police officer) the circumstances may be less serious. Because of the constraints upon referral, the Children's Court has developed a diversionary conferencing program to deal with those scheduled offences where the circumstances of the offence are less serious. However, this option is not currently available in regional areas.⁸⁰

Proposal 40

That the categories of offences listed in Schedule 1 and Schedule 2 of the *Young Offenders Act 1994* (WA) be immediately reviewed to enhance the availability of diversion to the juvenile justice teams for offences committed in circumstances considered less serious.

The Commission also considers, for the same reasons discussed in relation to cautions, that a referral to a juvenile justice team should not later be used against a juvenile as part of their previous history of offending. Although a young person must accept responsibility for the alleged offence and consent to the referral, this is not the same as proof of guilt. A person may accept responsibility without being aware that a defence to the charge was available. For some Aboriginal children, an acceptance of responsibility may be based on customary law notions of collective responsibility. For example, a young Aboriginal person may accept responsibility for an offence because they were merely present while others committed the crime.

An exception should be provided where a court requires information about a past referral by police to a juvenile justice team in order to determine whether there should be another referral by the court.

Proposal 41

That the *Young Offenders Act 1994* (WA) be amended to provide that any previous referrals by the police to a juvenile justice team cannot be used in court against the young person unless it is necessary to determine whether the young person should again be referred to a juvenile justice team.

76. *B v Morrissey* (Unreported, Supreme Court of Western Australia, Full Court, No 162, 163 and 164 of 1995, 15 August 1996).

77. *Youth Justice Act 2005* (NT) s 39. The Commission is not aware of the types of offences that will be considered 'serious offences'.

78. *Young Offenders Act 1994* (WA) s 32.

79. *Young Offenders Act 1994* (WA) s 25.

80. See discussion under 'Sentencing Options', above pp 224–30.

Attending court without arrest

In Western Australia a police officer can institute criminal proceedings against a young person either by way of arrest or by issuing a notice to attend court. The choice of arrest is the more punitive option because it requires the young person to be taken to a police station, processed and either released on bail or remanded in custody. Section 42 of the *Young Offenders Act 1994* (WA) provides that unless inappropriate, a notice to attend court is the preferred option. The *COPs Manual* provides that a police officer may arrest a young person for a scheduled offence if the offence is serious; if destruction of evidence is likely if the child is not arrested; if it will prevent a further offending; if it will ensure attendance at court; or if there is no other appropriate course of action.⁸¹

Criteria for arrest are contained in legislation in other jurisdictions. Section 22 of the *Youth Justice Act 2005* (NT) provides that a police officer must not charge a young person (instead of issuing a summons) unless there are reasonable grounds for believing that the young person will not appear in court or there is a substantial risk of further offending, destruction of evidence or harm to the young person. Similar criteria apply in Queensland under the *Juvenile Justice Act 1992* (Qld).⁸² The Commission considers that the criteria for arrest should be specified in legislation.

Proposal 42

That the *Young Offenders Act 1994* (WA) include the relevant criteria (as set out in the *COPs Manual*) for the decision whether to arrest a young person or alternatively to issue a notice to attend court.

Diversion to a Community Justice Group

It has been recognised that Aboriginal people should be involved in the development and delivery of diversionary programs for Aboriginal offenders, especially young offenders.⁸³ The Commission strongly supports

the development of Aboriginal-controlled diversionary programs and in particular programs or processes determined by a community justice group. In a case involving a potential breach of Western Australian criminal law members of the group may decide, that it is appropriate for the matter to be dealt with by the group or a specific diversionary program within the community.⁸⁴ This approach can be termed 'pure' diversion: there is no involvement in the criminal justice system at all. It is no different to a family discovering that their child is using drugs and deciding to deal with it without recourse to the criminal law. Similarly, children may be involved in behaviour at school, that strictly speaking constitutes an offence, but the authorities and those involved make a choice to deal with it internally. In other cases a matter may come to the attention of the police (via the victim, a member of the community, or directly as a result of witnessing the behaviour). In this situation the police must consider whether referral to a community justice group or Aboriginal diversionary program would be appropriate.

The Commission considers that it is inappropriate to prescribe excessive procedural safeguards to the operation of community justice groups. To do so would reduce both the flexibility of the group and the ability to determine its own issues and processes. As discussed already there is no restriction (apart from the constraints of Australian law) on the processes to be developed by a community justice group.⁸⁵ In relation to matters that have come to the attention of the police (that is, offences against Australian law) the alleged offender will have to consent to being dealt with by the community justice group. This factor will operate as a safeguard upon the procedures developed. There should be no restrictions on the types of offences or number of times that a young person can be referred.

Just as it is important that cautions and police referrals to a juvenile justice team are not held against a young person later in court, any diversion to a community justice group should not be subsequently mentioned in court. It is vital to ensure that a referral to a community justice group does not have any negative

81. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.4.

82. *Juvenile Justice Act 1992* (Qld) ss 12–13.

83. National Aboriginal Justice Advisory Committee, *Recommendations from the Ministerial Summit on Indigenous Deaths in Custody* (February 1997) <http://www.atsic.gov.au/issues/law_and_justice/rciadic/ministerial_summit/minsummit_7.asp>; Aboriginal Justice Council, *Our Mob Our Justice: Keeping the Vision Alive 1998 Monitoring Report of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody in Western Australia* (1999) 66.

84. In this situation it will always be possible for the victim of an offence to make a complaint to the police.

85. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

legal outcomes for the young person. It is acknowledged, however, that a court may wish to be informed of a previous referral if the court is itself considering referral to a community justice group.

Proposal 43

That a diversionary scheme for young Aboriginal people be established to involve the referral by the police of young offenders to community justice groups. Initially, this scheme should be introduced via pilot programs in at least one metropolitan and one remote or regional location. After a suitable period the effectiveness of the scheme should be evaluated and the need for any legislative or policy changes should be considered. The scheme should ensure that:

- Aboriginal community justice groups are adequately resourced to institute diversionary programs.
- The scheme is flexible enough to allow different communities to develop their own processes and procedures.
- As an overriding safeguard the alleged offender must consent to being referred by the police to the community justice group.
- If the young person does not consent, if the community justice group does not agree to deal with the matter, or if the community justice group is not satisfied with the outcome, the matter can be referred back to police to be dealt with in the normal manner.
- A previous referral to a community justice group does not count as a conviction against the young person and is not to be referred to in a court unless, and only for the purpose of, considering whether the young person should again be referred to a community justice group.

Police Interrogations

The Vulnerability of Aboriginal Suspects

A person being questioned by police is potentially vulnerable. Nervousness, fear, intimidation or lack of understanding may lead to miscommunication and false confessions. Rules have developed over time to protect suspects. Apart from limited exceptions, such as the requirement for a person to give their name and address, a person can refuse to answer questions by police. A confession (that is, an admission of guilt of an offence) or an admission (that is, an admission of a particular element of an offence) cannot be used as evidence unless made voluntarily 'in the exercise of a free choice to speak or be silent'.⁸⁶ Further, a court has discretion to refuse to admit confessional material (confessions or admissions) if it considers that it would be unfair for the material to be used against the accused.⁸⁷

The vulnerability of Aboriginal suspects who are being questioned in police custody has been recognised for a long time.⁸⁸ Aboriginal people under police interrogation face problems with language, communication and cultural barriers coupled with a long-standing fear and mistrust of police. Specific problems, such as 'gratuitous concurrence', are considered in detail in the section on evidence.⁸⁹ It is sufficient to note at this stage that Aboriginal suspects may be more likely to agree with propositions put to them by police even when these propositions are false. Miscommunication can undoubtedly occur between a police officer and the suspect where English is not the suspect's first language. Further, traditional Aboriginal people may find it difficult to understand the concept of guilt under Australian law. Under customary law the concept of responsibility is much broader and collectively based.⁹⁰ Thus a simple assertion by a traditional Aboriginal person that he or she is guilty or responsible for the alleged crime must be viewed cautiously. The high level of hearing loss that exists in some Aboriginal communities

86. *MacPherson v The Queen* (1981) 147 CLR 512, 519 (Gibbs CJ and Wilson J). Once an issue about voluntariness of an admission or a confession has been raised, the burden is on the prosecution to prove on the balance of probabilities that it was made voluntarily: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.5.1].

87. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 254.

88. Eggleston E, *Fear, Favour of Affection: Aborigines and the criminal law in Victoria, South Australia and Western Australia* (Canberra: Australian National University Press, 1976) 46; Sweeney D, 'Police Questioning of Aboriginal Suspects for Commonwealth Offences – New Laws' [1992] *Aboriginal Law Bulletin* 5; ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [546].

89. See discussion under Part IX 'Leading Questions', below pp 398–99.

90. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.5.1].

causes additional communication problems between Aboriginal suspects and police.⁹¹

A useful case study was considered in Catherine Wohlan's background paper for this reference.⁹² The suspect was arrested by police at 3:00 am in relation to a homicide. The interview commenced at 11:45 am. The suspect spoke Standard English as his fourth language. There was no interpreter in the room. Although the suspect was accompanied by a family member, this person had the same language constraints as the suspect. After administering the standard caution to the suspect that he did not have to answer any police questions the following exchange took place:

Police: Do you understand that?
Suspect: (Nods) no audible response.
Police: Okay? So do you have to talk to us? If I ask you a question, do you have to answer it? Can you talk when you answer questions?
Suspect: I'll leave it out.
Police: So do you have to talk to me or not?
Suspect: I'll leave it or—
Police: You can leave it if you—if I ask you a question and you don't want to answer if—
Suspect: Yeah.
Police: —you just say “no, I don't want to answer that question”.
Suspect: I'll leave it on the murder.
Police: That question.
Suspect: Yeah.
Police: Yeah, But you don't want to talk to us at all?
Suspect: No.
[After the suspect's relative left the room]
Police: Okay. Now, just going back, do you have to—if I ask you a question and if you don't want to answer that question, do you have to?
Suspect: Yeah.
Police: Do you have to talk to me?
Suspect: Yes.
Police: If I ask you a question and you don't want to answer it, what happens then? What do you do?
Suspect: If you're asking me a question?
Police: Yeah. If you don't want to—if I ask you a question that you don't like, do you have to tell me something?
Suspect: Yeah.
Police: Or can you say “no, I don't want to talk to you”?
Suspect: Yeah I'll try.
Police: You only talk to me if you want to.
Suspect: Yeah.

Police: You want to talk?
Suspect: Talk now?
Police: Yeah
Suspect: No.
Police: You just told us before though—
Suspect: Yeah.

The suspect then made what was considered by the police to amount to a confession. Wohlan notes that the suspect agreed to propositions put by the police rather than speaking in his own words: 'gratuitous concurrence' was therefore evident during the interview. When the matter was heard in court it was accepted that the interview was inadmissible. The accused was convicted of manslaughter.⁹³ Wohlan refers not only to the unfairness of the interrogation process but also to the dissatisfaction of the victim's family with the result. The Commission emphasises that the failure of police to ensure that an interview is conducted properly has two potential undesirable consequences: an innocent person is convicted or alternatively a guilty person is acquitted because the evidence of the confession cannot be used in court. The interests of justice for all concerned demands that police interrogations are undertaken fairly.

In another example, an Aboriginal accused was asked no less than 20 separate questions in relation to whether he understood that he was not obliged to answer questions by police. Regardless of the manner in which the question was asked the accused responded 'yes' and nothing other than 'yes' on every occasion.⁹⁴

The 'Anunga Rules'

In *R v Anunga*⁹⁵ Forster J in the Northern Territory Supreme Court set out a number of guidelines to be followed by police when questioning an Aboriginal suspect. He observed that Aboriginal suspects may be disadvantaged because they may not fully understand English, may be more likely to agree with propositions put by the police and may find the standard caution confusing.⁹⁶ The guidelines were not intended as mandatory requirements; however, the failure to comply without sufficient reason has led to the exclusion of the confessional material.⁹⁷ The guidelines can be summarised as follows:

91. Howard D, Quinn S, Blokland J & Flynn M, 'Aboriginal Hearing Loss and the Criminal Justice System' [1993] *Aboriginal Law Bulletin* 58.

92. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 3–10.

93. Wohlan notes that the charge was reduced from murder to manslaughter but it is not clear whether the accused then pleaded guilty or was convicted after trial: *Ibid* 8.

94. McRae H, Nettheim G & Beacroft L, *Aboriginal Legal Issues: Commentary and materials* (Sydney: Law Book Co, 1991) 254.

95. (1976) 11 ALR 412 (Forster J).

96. *Ibid* 414.

97. *Ibid* 415.

- Unless the suspect is fluent in English an interpreter should be provided.
- Wherever practicable a 'prisoner's friend' should be present and this person should be someone in whom the suspect has confidence.
- The caution should be administered very carefully and simply. The interviewing officer should ensure that the suspect can explain the meaning of the caution and should not proceed to question the suspect unless satisfied that he or she understands the right to remain silent.
- Questions that are suggestive of the answer or amount to cross-examination should be avoided.
- Even when the suspect has confessed to the offence, police should continue to investigate the matter in order to find additional proof.
- The suspect should be offered food and drink and the use of a toilet.
- The suspect should not be interrogated when he or she is tired, intoxicated or ill.
- All reasonable steps should be taken to obtain legal assistance if requested by the suspect.
- If the suspect indicated that he or she does not wish to answer questions the interrogation should stop.⁹⁸

The Law in Western Australia

Western Australian police are directed by the *COPs Manual* to observe the Anunga Rules.⁹⁹ The directions or guidelines contained in the *COPs Manual* are not binding. Failure to comply with the *COPs Manual* does not render a confessional statement inadmissible.¹⁰⁰ Courts in Western Australia have recognised problems faced by Aboriginal people during police interrogations, making reference to the Anunga Rules when appropriate. However, Western Australian courts have consistently maintained that the guidelines are not

binding law in this state, but simply constitute a general indication of what would be regarded as a fair interrogation.¹⁰¹ Vincent has commented that different judges in this state place varying weight on the Anunga Rules.¹⁰²

The repealed s 49 of the *Aboriginal Affairs Planning Authority Act 1972 (WA)*¹⁰³ covered both the acceptance of a plea of guilty and a confession during police questioning. Section 49 was not discretionary: if the accused lacked the relevant capacity to understand then the court was required to exclude the confessional material. In *Simon v The Queen*,¹⁰⁴ Roberts-Smith J stated that when considering the admissibility of confessional material:

The trial judge is obliged by s 49 to have regard, not only to the content of the interview or statements constituting the admissions, but to the accused's demeanour whilst testifying on the voir dire or otherwise being examined in the court, to determine whether or not he was capable of comprehending the circumstances under which he had foregone his right to remain silent and under which he had confessed and whether he was a person capable of understanding the confession that he had made.¹⁰⁵

Many cases in Western Australia have relied on s 49 in addition to the general common law principles on the admissibility of confessional material.¹⁰⁶ As s 49 was only repealed in 2004 it is difficult to know whether its abolition will have a significant impact upon Aboriginal people. The new *Criminal Procedure Act 2004 (WA)* now covers the issue of acceptance of a plea of guilty, but there is no provision in relation to confessional material.

There is only one legislative provision in Western Australia specifically covering police interrogations.¹⁰⁷ Section 570D of the *Criminal Code (WA)* requires an interview in relation to a serious offence to be video-recorded.¹⁰⁸ Any admission or confession that is not recorded on video will be inadmissible unless the prosecution can prove, on the balance of probabilities,

98. Ibid 414–15.

99. Western Australian Police Service *COPs Manual (Public Version)* (25 January 2005) AD-1.3.

100. *Norton v The Queen* [2001] WASCA 207 (20 July 2001), [201] (Roberts-Smith J; Wallwork and Pidgeon JJ concurring).

101. See *Webb v The Queen* (1994) 13 WAR 257; *R v Nandoo* (Unreported, Supreme Court of Western Australia, No 130 of 1996, Owen J, 20 June 1996); *Njana v The Queen* (Unreported, Supreme Court of Western Australia, No 162 of 1997, Scott J, 11 February 1998); *Simon v The Queen* [2002] WASCA 329, [34] (Roberts-Smith J, Steytler J and Templeman J concurring).

102. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 41.

103. See discussion under 'Fitness to Plead', above pp 232–34.

104. [2002] WASCA 329.

105. Ibid [30] (Steytler and Templeman JJ concurring).

106. See for example *Cox v The Queen* [2002] WASCA 358 (19 December 2002); *Simon v The Queen* [2002] WASCA 329 (10 October 2002).

107. The Commission is aware of the Criminal Investigation Bill 2005 currently before Parliament and it is considered below in this discussion.

108. A serious offence is defined as an indictable offence that must be dealt with in a superior court for an adult and for a juvenile any indictable offence: see *Criminal Code (WA)* s 570D (1).

that there was a reasonable excuse for not video-taping the material or the court is satisfied that there are exceptional circumstances, which in the interests of justice, justify the admission of the evidence. A reasonable excuse may include that the accused did not consent to the interview being video-taped, the equipment malfunctioned or that it was not practicable to video-tape the interview.

Interviewing juveniles

The above principles and guidelines are equally applicable to the interrogation of children. In addition, s 20 of the *Young Offenders Act 1994* (WA) states that a police officer is required to notify a responsible adult before questioning a young person about an offence. There is no legislative requirement that a young person must be provided with an opportunity to speak to a responsible adult prior to any questioning. Nor is there any legislative requirement that a responsible person must be present during the interview.

The *COPs Manual* provides extensive guidelines about interviewing children;¹⁰⁹ in particular that the caution must be administered properly having regard to the young person's age, cultural background and maturity. The manual further provides that unless an independent person is present during an interview any admission may be ruled inadmissible. The manual suggests, where possible, the independent person should be of the same gender as the young person and of a similar cultural background.

Other Australian jurisdictions provide greater legislative protection for young people. Section 23 K of the *Crimes Act 1914* (Cth) provides that a young person must not be questioned without an interview friend being present and the young person must be given an opportunity to communicate with the interview friend in private.¹¹⁰ Section 252 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that a police officer must not question a young person unless an opportunity has been provided for the young person to speak to a support person of their own choice. The recently passed *Youth Justice Act 2005* (NT) provides that police officers are required to explain all matters

connected with an investigation of an offence to a young person in a 'language and manner the youth is likely to understand, having regard to the youth's age, maturity, cultural background and English language skills'.¹¹¹ Under this legislation a police officer cannot question a young person without a support person being present.¹¹²

The Need for Reform

The ALRC concluded that protective interrogation rules or guidelines should apply to all Aboriginal people that have difficulties with comprehending their rights under interrogation regardless of whether difficulties are caused by 'lack of education, or lack of understanding based on different conceptions of law, or undue deference to authority'.¹¹³ It recommended that the basic interrogation guidelines should be enacted in legislation to make it clear they are to be taken 'seriously'.¹¹⁴

In the Northern Territory, Mildren J has argued that the rules are not being adequately put into practice. He identified ongoing problems of 'gratuitous concurrence'; the use of leading questions; inappropriate choice of interview friends; and inadequate use of interpreters.¹¹⁵ During the Commission's consultations in Fitzroy Crossing it was stated that the Anunga Rules were not followed and that police did not make proper use of the Kimberley Interpreter Service.¹¹⁶ Vincent suggested that there should be new rules for the interrogation of Aboriginal people and that these rules should stress the requirement for fully informed consent to the interview process.¹¹⁷

The matters outlined above suggest that Aboriginal suspects remain disadvantaged in police interrogations. The Commission is of the view that in addition to the common law rules, there should be legislative provisions that set out the minimum requirements for police questioning. Other jurisdictions in Australia have enacted legislation covering the rights of a suspect during police questioning and have included limited exceptions providing some flexibility. For example, in Queensland the police do not have to comply with

109. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) OP-24.17.

110. In the case of an Aboriginal or Torres Strait Islander young person, an interview friend can be chosen from a relevant list of suitable persons.

111. *Youth Justice Act 2005* (NT) s 15. This act was assented to on 22 September 2005.

112. *Youth Justice Act 2005* (NT) s 18.

113. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [565].

114. *Ibid* [573].

115. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21 *Criminal Law Journal* 7, 8–12.

116. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 44.

117. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 41.

the requirement to allow a suspect to speak with an interview friend if urgent questioning is required in order to protect the safety of a member of the public.¹¹⁸

The Criminal Investigation Bill 2005 (WA) is currently being considered by Parliament. It provides (amongst other things) that a suspect is entitled to:

- be informed of the offences that he or she is suspected of having committed;
- be cautioned before being interviewed;
- be given a reasonable opportunity to communicate or attempt to communicate with a lawyer;
- be given a reasonable opportunity to communicate or attempt to communicate with a relative or friend to inform them of his or her whereabouts; and
- the services of an interpreter before being interviewed if he or she for any reason is unable to adequately understand or communicate in spoken English.¹¹⁹

Although the Commission supports the legislative protection of these rights it does not consider that the proposed Bill provides adequate protection for Aboriginal people. Discussed below are the four essential requirements for any police interview for both adults and juveniles.

Caution

Before a police officer questions a suspect he or she is required to issue a caution: that the suspect is not obliged to answer any questions but if so any answers may be used in evidence against the suspect. As recognised in *R v Anunga* the standard form of the caution may be confusing. In *Cox v The Queen*¹²⁰ the accused was asked a number of times whether he understood the meaning of the caution – in answer to each of these questions he simply replied ‘yeah’. Olsson AUJ observed that his response was in ‘a manner which is typical of Aboriginal people in such situations and, of itself, is not reliable indication of any positive comprehension at all’.¹²¹

The Criminal Investigation Bill 2005 provides for the requirement to issue a caution;¹²² however, it is the

Commission’s opinion that this alone is not adequate. The Commission is of the opinion that it is not sufficient to argue that procedural safeguards are complied with most of the time. Proper understanding of the caution goes to the heart of whether a confession is voluntary and therefore also admissible. The Commission is concerned about the (as yet unknown) impact of the repeal of s 49 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). Section 258 of the *Police Powers and Responsibilities Act 2000* (Qld) provides that prior to questioning a police officer must caution the person and the caution must be given or ‘translated into a language in which the person is able to communicate with reasonable fluency’. It is also a legislative requirement in Queensland that the police ask the suspect to explain the caution in their own words.¹²³ The police in Western Australia should be required to ensure that a suspect understands the caution before asking any further questions.

Legal representation

Bearing in mind the problems experienced by Aboriginal people in the criminal justice system and poor Aboriginal-police relations, the ability to seek legal advice prior to any interrogation takes on increased importance. The *COPs Manual* provides that, with the approval of the suspect, the police are required to notify the ALS whenever an Aboriginal person is charged.¹²⁴ Apart from the limitations of a non-binding set of directions, the guidelines only require notification if the person is *charged*. In the context of interrogations it is vital that Aboriginal people are made aware of their right to contact a lawyer and are given an opportunity to exercise that right before any questioning commences. The Commission notes that there is no reason to limit this requirement to Aboriginal people.

In Queensland, police are generally required to advise a suspect of their right to speak to a lawyer (or a friend). In addition the police must allow a reasonable time for a lawyer to attend and once in attendance the suspect and the lawyer must be allowed to speak in private.¹²⁵ The requirement to advise a suspect of

118. *Police Powers and Responsibilities Act 2000* (Qld) s 268(2).

119. Criminal Investigation Bill 2005 (WA) cl 135 & 136.

120. [2002] WASCA 358 (19 December 2002).

121. Ibid [35] (Olsson AUJ; Anderson and Templeman JJ concurring).

122. For example, *Crimes Act 1958* (Vic) s 464A; *Police Powers and Responsibilities Act 2000* (Qld) s 258.

123. It has been noted that the Northern Territory has developed a ‘preamble’ to the caution using Aboriginal languages and concerting legal concepts, such as the right to remain silent into an understandable form: see ATSIC, *Ministerial Summit on Indigenous Deaths in Custody* (Canberra, July 1997).

124. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) LP-2.1.

125. *Police Powers and Responsibilities Act 2000* (Qld) ss 249, 250. The Commission notes that s 268 provides that the police do not have to comply with the requirements under the legislation if having regard to the safety of other people, or the police reasonably suspect that questioning is so urgent that it should not be delayed. A similar provision is contained in the *Crimes Act 1914* (Cth) s 23G.

the right to speak to a lawyer and to provide an opportunity for communication to take place is also set out in legislation in other jurisdictions as well as the Criminal Investigation Bill 2005.¹²⁶

The Queensland and Commonwealth legislation provide specifically that when questioning an Aboriginal or Torres Strait Islander person there is an additional requirement for the police to notify a legal aid organisation unless the police officer reasonably suspects that the person is not disadvantaged compared to the general Australian community.¹²⁷

Interpreters

The right to an interpreter during police questioning is fundamental. It can never be fair to a suspect to proceed with an interrogation if the suspect does not fully understand the questions. It is well recognised that in Western Australia there is inadequate use of interpreters.¹²⁸ The Commission supports the inclusion of the right to an interpreter in the Criminal Investigation Bill 2005. Similarly, other jurisdictions in Australia provide in legislation that a suspect has a right to an interpreter where he or she is unable to speak English with reasonable fluency.¹²⁹

In practice, one difficulty may be recognising that where an Aboriginal person speaks English to a limited extent he or she may still require the services of an interpreter. In this context it is vital to take into account the difference between Standard English and Aboriginal English. These differences are discussed in Part IX 'Aboriginal Customary Law in the Courtroom: Evidence and Procedure'.¹³⁰ The Commission has already referred to the Northern Territory Law Society Protocols for lawyers representing Indigenous people.¹³¹ These protocols contain an interpreter test with suggested questions. The Commission considers that in addition to a statutory requirement that an interpreter should be provided prior to police questioning, the Western Australia Police Service, in conjunction with appropriate Indigenous interpreters, should develop a set of protocols.

Proposal 44

That the Western Australia Police Service and relevant Aboriginal interpreter services develop a set of protocols for the purpose of considering whether an Aboriginal person requires an interpreter during an interview.

Interview friend

The particular vulnerability of Aboriginal people in police custody can be overcome to some degree by the presence of an interview friend. In Queensland and Victoria police are required to advise a suspect of their right to speak to a relative or a friend.¹³² Section 23H of the *Crimes Act 1914* (Cth) deals specifically with Aboriginal and Torres Strait Islander people. It provides that the police should not interview the suspect if an interview friend is not present unless the suspect has expressly waived the right to an interview friend (the burden is on the prosecution to prove that the suspect waived their right in this regard). If the suspect does not exercise their right to choose an interview friend the police can choose a representative from an Aboriginal legal aid organisation or from a relevant list of suitable persons.

The question who should undertake the role of an interview friend is subject to debate. One view is that the interview friend should be freely chosen by the suspect.¹³³ On the other hand, if the person chosen is in a similar position with respect to understanding and communication as the suspect, it is unlikely that they will be of any real assistance. The ALRC observed the difficulty:

The question is whether an Aboriginal suspect should have the right to choose a 'friend' even if that person will not be able to assist him. Such a choice may have some psychological advantages and make the suspect more at ease, but the chosen 'friend' may be able to do little or nothing to prevent him being overborne. A person who is better able to protect a suspect's legal rights may be of greater benefit to a suspect even though unknown to him.¹³⁴

126. *Crimes Act 1914* (Cth) s 23G; *Crimes Act 1958* (Vic) s 464C.

127. *Police Powers and Responsibilities Act 2000* (Qld) s 251; *Crimes Act 1914* (Cth) s 23H.

128. For a detailed discussion of interpreters, see discussion under Part IX 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', below pp 401–406.

129. See for example *Police Powers and Responsibilities Act 2000* (Qld) s 260; *Crimes Act 1914* (Cth) s 23N; *Crimes Act 1958* (Vic) s 464D.

130. See discussion under Part IX 'Aboriginal English', below pp 397–98.

131. See discussion under 'Legal Representation', above pp 102–103.

132. *Police Powers and Responsibilities Act 2000* (Qld) s 249; *Crimes Act 1958* (Vic) s 464C.

133. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [568].

134. *Ibid* [567].

In Western Australia the only direction comes from the *COPs Manual* which states that an interview friend should be a person that the suspect has confidence in.¹³⁵ The right to choose an interview friend is essential. However, where a suspect does not exercise that right, appropriate Aboriginal persons should be considered. Members of a community justice group could, after receiving training about the relevant aspects of the criminal justice system, provide a suitable panel of interview friends.

The Commission's View

The Commission considers that strengthening the existing guidelines in relation to the interrogation of Aboriginal suspects is required. Legislation should set out the minimum requirements for any police questioning. The current provisions of the Criminal Investigation Bill 2005 do not go far enough. The Commission acknowledges that there will need to be appropriate exceptions. This approach would constitute a strong direction to police officers and courts of the *minimum* requirements for a fair interview.

Proposal 45

That the following rights be protected in legislation so as to render inadmissible any confessional evidence obtained contrary to them save in exceptional circumstances:

- That an interviewing police officer must caution a suspect and must not question the suspect until satisfied that the suspect understands the caution. In order to be satisfied that the suspect understands the caution the interviewing officer must ask the suspect to explain the caution in his or her own words.
- If the suspect does not speak English with reasonable fluency the officer shall ensure that the caution is given or translated in a language that the suspect does speak with reasonable fluency and that an interpreter is available before any interview commences.
- That before commencing an interview the interviewing police officer must advise the suspect that he or she has the right to contact

a lawyer and provide a reasonable opportunity for the suspect to communicate (in private) with a lawyer.

- In the case of a suspect who is an Aboriginal person the police must notify the Aboriginal Legal Service prior to the interview commencing and advise that the suspect is about to be interviewed in relation to an offence and provide an opportunity for a representative of the Aboriginal Legal Service to communicate with the suspect. The interviewing officer does not have to comply with this requirement if the suspect has already indicated that he or she is legally represented by another lawyer or if the suspect states that he or she does not want the Aboriginal Legal Service to be notified.
- If the suspect does not wish for a representative of the Aboriginal Legal Service to attend or there is no representative available the interviewing officer must allow a reasonable opportunity for an interview friend to attend prior to commencing the interview. The interviewing officer does not have to comply with this requirement if it has been expressly waived by the suspect.
- That appropriate exceptions be included, such as an interviewing officer is not required to delay the questioning in order to comply with this provision if to do so would potentially jeopardise the safety of any person.

Policing Aboriginal Communities and Aboriginal Involvement in Policing

Policing Aboriginal Communities

The lack of police presence in some Aboriginal communities is a major concern.¹³⁶ In an area where there is no permanent police presence, policing is conducted by periodic patrols and reactive police attendance when required. Some communities use Aboriginal wardens and in some cases an Aboriginal Police Liaison Officer is stationed in the community.¹³⁷

135. Western Australia Police Service *COPs Manual (Public Version)* (25 January 2005) AD-1.3. It also states that the Commonwealth Attorney-General's Department has a list of suitable persons to act as an interview friend or as an interpreter and this list is made available to state police.

136. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) iii.

137. Ibid 10.

The Commission has already discussed the role of Aboriginal wardens in policing and enforcement of by-laws (where they exist) in remote Aboriginal communities.¹³⁸ The Commission suggested that increasing the enforcement powers of wardens was not the best approach. Aboriginal wardens experience problems in enforcing 'white laws' in their own communities due to customary law considerations such as avoidance rules and kinship obligations. Most of the communities consulted by the Commission expressed the desire for full-time police presence.¹³⁹ It is the view of the Commission that wardens should not be required to do the job of police, not least because remote Aboriginal communities are entitled to the same level of policing as any other Australian community. This does not mean, of course, that Aboriginal communities cannot develop informal self-policing such as the current patrols.¹⁴⁰ Each community has different needs and the structure of any self-policing scheme must be determined by the community. The establishment of Aboriginal community justice groups represents one method under which communities can determine their own justice issues and the most appropriate methods of enforcing community rules and sanctions in discrete Aboriginal communities.¹⁴¹

In response to the Gordon Inquiry the government announced its plan to establish a permanent police presence in nine remote locations.¹⁴² The Western Australia Police Service's *Strategic Policy on Police and Aboriginal People* acknowledges that all Western Australians are entitled to 'an equitable level and quality of police protection and services'.¹⁴³ In addition, it was planned that multi-functional facilities, incorporating various government agencies including the police, Department of Justice and Department of Community Development would be built. The first multi-functional facility was opened in April 2004 at Kintore with one Western Australian police officer permanently stationed

and working in conjunction with Northern Territory police officers.¹⁴⁴ On 8 September 2005 the Western Australia Police Service announced that the second multi-functional facility at Wirrimanu (Balgo) community had opened.¹⁴⁵ The next facility is scheduled for construction at Warburton.

Aboriginal Police Liaison Officers

Schemes that encourage participation of Aboriginal people in policing throughout Australia have been in existence for many years.¹⁴⁶ In 1975 the Aboriginal Police Aide Scheme commenced in Western Australia.¹⁴⁷ Aboriginal Police Liaison Officers (APLOs) are appointed under s 38A of the *Police Act 1892* (WA) which still uses the term 'Aboriginal aides'. The instrument of appointment specifies that APLOs have the same powers as ordinary police officers except that these powers are limited to Aboriginal people. APLOs can only exercise powers against non-Aboriginal people if assisting or directed by a mainstream police officer.¹⁴⁸ The original intention of the scheme was to:

- improve Aboriginal–police relations;
- improve communication between Aboriginal people and the police;
- assist Aboriginal people in police custody;
- assist Aboriginal people to understand Australian laws;
- encourage Aboriginal people to approach police for assistance; and
- improve race relations in the community.¹⁴⁹

There are currently just over 140 APLOs in Western Australia. Approximately one-third of these are female. Their role has altered over time and APLOs are now more involved in law enforcement.¹⁵⁰ With a greater emphasis on enforcement APLOs may experience cultural pressure from families or kin.¹⁵¹ It has been

138. See discussion under 'The Operation of the *Aboriginal Communities Act 1979* (WA)'; above pp 116–18.

139. Similarly the ALRC found that all communities consulted recognised the need for police presence: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [847].

140. See discussion under 'Patrols', above pp 112–14.

141. See discussion under 'The Commission's Proposal for Community Justice Groups', above pp 133–41. The ALRC referred to an example at Roper River in the Northern Territory where local Aboriginal 'police' were appointed (informally) from each relevant skin group: see ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [859].

142. Remote Service Delivery Project Steering Committee, *Warburton Multi-Functional Police Facility: Services delivery model*, Final Report (September 2003) 4. The nine locations are Warburton, Kalumburu, Balgo, Jigalong, Dampier Peninsula, Bidyadanga, Warmun, Wakakurna (Dockar River) and Kintore (the latter is a multi-jurisdiction project with the Northern Territory and South Australia).

143. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: Policy Statement and Rationale* (2004) 3.

144. Western Australia Police Service, 'New Police Facility for Remote Community' (Media Release, 8 September 2005).

145. Ibid.

146. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [852].

147. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 24.

148. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) AD-1.2.2.

149. Galton-Fenzi AK, *Policing Remote/Discrete Communities in Western Australia* (Perth: Western Australia Police Service, June 2002) 24.

150. Interview with Inspector Keith Galton-Fenzi, Western Australian Police Service (Telephone interview, 22 September 2005).

151. Ibid.

observed that police aides (as they were called in 1991) have described themselves as 'caught between two worlds, neither full members of the police force, nor accepted by the local Aboriginal community'.¹⁵² A further criticism of the police aide scheme was that (until recently) there was no method for transition to mainstream policing.¹⁵³ Vincent commented that the specialist liaison role of APLOs is 'undervalued and underutilised'.¹⁵⁴

The Commission received mixed views in relation to the effectiveness of APLOs. In Fitzroy Crossing it was stated that Aboriginal people generally do not want to become APLOs because they do not want to 'lock up our people'. Also it was claimed that when an APLO comes from a different area he or she will not be considered representative of the Aboriginal community.¹⁵⁵ In Cosmo Newbery it was said that APLOs 'think they are policemen, not liaison with the community. They are sometimes not from the community, and so do not understand local ways'. In Kalgoorlie it was suggested that the functions of APLOs need to be reviewed. Instead of undertaking ordinary police duties the original liaison role should be brought back.¹⁵⁶

The Gordon Inquiry concluded that APLOs serve an important role in providing policing services to Aboriginal communities and supported the creation of 40 new APLO positions. It also called for increased recruitment of female APLOs.¹⁵⁷

In 2001 the Western Australian Police Service developed a Transitional Model which provides for APLOs to make the transition to mainstream police positions. This model allows accreditation for years served as APLOs.¹⁵⁸ In 2005 the Transitional Model commenced and all 144 APLOs received a letter asking if they wished to make the transition or remain as liaison officers.¹⁵⁹ The long-term objective is for more Aboriginal people to enter the mainstream police service.¹⁶⁰ The Commission has also been advised that the future aim is to employ unsworn Aboriginal liaison officers.¹⁶¹

The voluntary option for APLOs to make the career transition to an ordinary police officer is supported by the Commission. The current practice of using APLOs as front-line police officers while at the same time including them in a category that is perceived as second class is not appropriate. An increase in Aboriginal mainstream police officers also has the potential to reduce the lack of understanding of Aboriginal culture and customary law in the service. Whether the original objectives of the scheme can be achieved through the appointment of unsworn Aboriginal liaison officers remains to be seen. Those objectives remain valid and important. In this regard, the Commission suggests that members of Aboriginal community justice groups as well as any informal wardens or patrols members operating in their respective communities be used for this role.

In conclusion, there should be Aboriginal police officers with the same powers and responsibilities as all other police. Aboriginal police officers will be responsible to the Police Service. This is a matter of choice for the individual concerned. On the other hand Aboriginal community members as described above can appropriately undertake a liaison role while still maintaining accountability to their community.

Cultural Awareness Training

The Gordon Inquiry was informed by the Western Australia Police Service that 'cultural sensitivity training' commenced during the 1980s and at the time of the inquiry involved a four-day training course as well as a further two-day course required for promotion to the level of senior constable. The Gordon Inquiry recommended that cultural sensitivity training 'about and in conjunction with, local Aboriginal communities' should be undertaken when a police officer joins a police station.¹⁶²

The *COPs Manual* contains a direction that the officer in charge of a police station 'shall, as soon as practical, ensure that upon the arrival of a new sworn member, that member receives a period of instruction on issues

152. Western Australian Equal Opportunity Commission as quoted in Payne S, 'Aboriginal Women and the Law' in Eastale P & McKillop S (eds), *Women and the Law* (Australian Institute of Criminology Conference Proceedings No 16, Canberra, 1993) 65, 70.

153. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [854].

154. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 30.

155. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 44.

156. LRCWA, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 26.

157. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 218.

158. *Ibid* 219.

159. Eliot L, 'Police APLOs to Join the Ranks or Vanish', *The West Australian*, 5 July 2005, 35.

160. Interview with Inspector Keith Galton-Fenzi, Western Australia Police Service (Telephone interview, 22 September 2005).

161. Interview with Superintendent Dwayne Bell, Western Australia Police Service (Telephone interview, 17 November 2005).

162. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 220.

of concern to the local Aboriginal community by a member of that community'.¹⁶³ It is also noted that there is a strategy in place for cultural orientation training for officers who transfer to areas with Aboriginal representation in the community.¹⁶⁴ Police officers apparently receive training about the guidelines and the interrogation of Aboriginal people.¹⁶⁵

Despite these provisions, Aboriginal people consulted by the Commission considered that there was a continuing need for better cultural awareness training for police. It was suggested that this training should be conducted by local Elders.¹⁶⁶ In Fitzroy Crossing it was stated that:

Police have no clue about cultural issues – even though they all profess to. One police officer said 'my boys understand the lingo', meaning the five Aboriginal dialects spoken in the area. This is not true.¹⁶⁷

The Police Service recognises that Aboriginal people need 'police officers to be culturally sensitive and aware of local traditions so they carry out their role without causing offence or embarrassment'.¹⁶⁸ The *Strategic Policy on Police and Aboriginal People: Policy Statement and Rationale* states that the Police Service is 'committed to the development of locally specific inter-agency cultural sensitivity training'.¹⁶⁹ The Commission



is of the view that given the continuing perception of Aboriginal people that the police are not generally culturally sensitive and because of the high numbers of Aboriginal people that come into contact with police, appropriate local cultural awareness training must be an immediate priority.

Proposal 46

That the Western Australian government provide adequate resources to ensure that every police officer who is stationed at a police station that services an Aboriginal community participates in relevant Aboriginal cultural awareness training.

This cultural awareness training should be presented by local Aboriginal people including, if appropriate, members of a community justice group.

The Future of Police and Aboriginal Relations

The need for effective cooperation between Aboriginal people and the police was acknowledged by the ALRC.¹⁷⁰ The Aboriginal Affairs Directorate was established in 1996 to provide assistance to Aboriginal people in their dealings with the police service, to provide strategic planning and policy services and to maintain the Aboriginal police liaison officer scheme.¹⁷¹ The Commission understands that the Aboriginal Affairs Directorate was abolished some time ago and replaced with the Aboriginal Policy and Services Unit. This unit was no longer responsible for the management of the Aboriginal police liaison officer scheme. APLOs were then directly answerable to the officer in charge of their district.

In November 2005 the Aboriginal and Policy Services Unit was amalgamated with the Strategic Policy and Development Unit. According to Superintendent Dwayne Bell the amalgamation has not resulted in any

163. Western Australia Police Service, *COPs Manual (Public Version)* (25 January 2005) AD-1.6.

164. *Ibid.*

165. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.5.3].

166. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 10; *Derby*, 4 March 2004, 53; *Kalgoorlie*, 25 March 2003, 26. The Commission notes that in Warrnambool, Victoria police have held cultural awareness training for new members. About 20 Aboriginal Elders attended the police stations and police officers were invited to speak to the Aboriginal community: see Davis S, 'Warrnambool Koori Court: Improving relations between indigenous people and Victorian police' (2005) 6 (14) *Indigenous Law Bulletin* 6.

167. LRCWA, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 44.

168. Western Australia Police Service, *Strategic Policy on Police and Aboriginal People: Policy Statement and Rationale* (2004) 3.

169. *Ibid.* 8.

170. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [847].

171. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into response by government agencies to complaints of family violence and child abuse in Aboriginal communities* (2002) 211.

Aboriginal people consulted by the Commission considered that there was a continuing need for better cultural awareness training for police.

reduction in staff – the same staff positions that were in the Aboriginal and Policy Services Unit are now included in the Strategic Policy and Development Unit and their role remains the same. Superintendent Bell explained that the purpose of the amalgamation is not to reduce the focus on Aboriginal policy, rather to ensure that all strategic policy within the police service does not overlook the needs of Aboriginal people. In addition the staff positions that formed the Aboriginal Policy and Services Unit will now have access to and assistance from other staff working in the policy area.¹⁷²

The Commission appreciates that the amalgamation may well be designed to ensure that policy and services concerning Aboriginal people are more effective. However, the failure to maintain a designated Aboriginal unit is contrary to the recommendations of RCIADIC that police should establish an Aboriginal specific policy and development unit, headed by an Aboriginal person reporting directly to the Commissioner of Police or his or her delegate.¹⁷³ One justification for a designated unit is that it goes some way to ensuring that the momentum to improve Aboriginal police relations and to develop policy continues. The incorporation of Aboriginal policy into a mainstream policy unit runs the risk that the impetus will be lost. The effectiveness of

an Aboriginal policy unit would otherwise have been enhanced by an increase in its resources. The Commission's proposed community justice groups will be far more effective where there are good working relationships between community justice group members and police. Bearing in mind the infancy of the new amalgamated Strategic Policy and Development Unit, it is difficult to know its capacity to take a more active role in improving justice outcomes for Aboriginal people and working with local Aboriginal community justice groups. Therefore, the Commission invites submissions as to whether the Aboriginal Policy and Services Unit should be reinstated and, further, provided with additional resources to adequately implement the proposals made in this Discussion Paper which impact upon the Police Service.

Invitation to Submit 8

The Commission invites submissions as to whether, in light of the Commission's proposals in relation to criminal justice (or for any other reason), the Western Australia Police Service's former Aboriginal Policy and Services Unit should be reinstated and provided with additional resources.

172. Information received from Superintendent Dwayne Bell by telephone, 17 November 2005. The Commission notes that of the two policy staff positions that formed the Aboriginal Policy and Services Unit, one position is a designated Aboriginal position and the other is currently occupied by an Aboriginal person in an acting capacity.

173. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991), Recommendation 225.

Prisons

Aboriginal people in Western Australia are disproportionately over-represented in prison and detention centres. The extent and causes of this over-representation has been discussed earlier.¹ Underlying many of the Commission's proposals is the objective of reducing the number of Aboriginal people in custody. Any significant reduction in the rate of imprisonment and detention of Aboriginal people in this state will not happen overnight. Therefore, the effectiveness and suitability of custodial conditions for Aboriginal people will remain an important issue for the foreseeable future.

Imprisonment and detention cause particular difficulties for Aboriginal people because they are separated from traditional lands, family, community and culture. An Aboriginal person in Warburton stated to the Commission that:

Such [prison] placements are destructive of Aboriginal law and culture: 'All teaching gets left behind when people are going through law but then get sent to prison – they miss out on law and knowledge'.²

Therefore, the management of custodial facilities must acknowledge the detrimental impact of custody upon Aboriginal people and provide culturally appropriate programs, activities and services. The Commission notes that the Department of Justice's *Prisons Division Strategic Plan for Aboriginal Services 2002–2005* refers to the importance of addressing the cultural needs of Aboriginal prisoners. Specifically this policy acknowledges that:

Recognition that family is central to the fabric of Aboriginal society and critical to its well-being. The rich and complex Aboriginal kinship system cannot be

explained or understood within the concept of the nuclear family. This rich and complex kinship system places great importance on certain familial obligations and responsibilities.³

The Commission has emphasised in this Part that policy aims and objectives must be converted into meaningful outcomes. The position of Aboriginal prisoners and detainees is no exception. The Commission does not intend to canvass in detail the many problems and issues concerning Aboriginal people in custody. Since June 2000 the Western Australian Office of the Inspector of Custodial Services has been responsible for examining and reporting on conditions within Western Australian custodial settings. The Inspector has made numerous recommendations concerning the adequacy of prison facilities and services for Aboriginal prisoners.⁴ Some of these recommendations have focused on the unacceptable conditions in many regional prisons.⁵ Others have been directed towards improving the availability of culturally appropriate programs and services for Aboriginal prisoners and detainees.⁶ Recently, the *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) (the Mahoney Inquiry) considered in detail the current state of custodial management in Western Australia. The Mahoney Inquiry (along with the Office of the Inspector of Custodial Services' *Directed Review of the Management of Offenders in Custody*) also addressed the current position with respect to Aboriginal prisoners and detainees. Given this comprehensive examination of custodial management in Western Australia the Commission does not consider that it is appropriate, or necessary, to re-examine these issues.

1. See discussion under 'Over-representation in the Criminal Justice System', above pp 95–99.

2. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5.

3. Department of Justice, Prisons Division, *Strategic Plan for Aboriginal Services 2002–2005*, 6.

4. In particular see the Office of the Inspector of Custodial Services' inspection reports of Broome, Eastern Goldfields, Greenough and Roebourne Regional Prisons. These prisons are characterised by the Inspector as 'Aboriginal prisons' because 75 per cent or more of their population is Aboriginal. Together these prisons hold almost half of the Aboriginal prisoner population of Western Australia. Inspection reports are available on the Office of the Inspector of Custodial Services' website <<http://www.custodialinspector.wa.gov.au>>.

5. *Ibid.*

6. *Ibid.*

Prisoner Attendance at Funerals

The Significance of Funeral Attendance

During the Commission's consultations the most important issue expressed in relation to prisons and Aboriginal customary law was attendance by prisoners at funerals. There were numerous references during the Commission's consultations indicating the cultural importance and obligation for Aboriginal people to attend funerals.⁷ In the Pilbara, it was stated that if an Aboriginal person does not attend a funeral this may 'break Aboriginal law'.⁸ In Albany one Aboriginal person said that:

I wanted to attend the funeral of my first cousin, I received a letter from my mother, but I was not able to attend the funeral and now that brings shame to me and I will have problems when I leave jail.⁹

In Carnarvon it was stressed that

You have no choice about these matters: 'If your face is missing, it will be noticed. People's attitudes to you changes if you do not attend'.¹⁰

If attendance is required at a funeral because of the prisoner's relationship to the deceased, failure to attend will cause distress and shame. In this regard it is important to understand that responsibility under Aboriginal customary law is often strict.¹¹ The fact that a prisoner does not attend a funeral through no fault of their own (because they are in prison and have not been granted permission to attend) does not necessarily relieve them from the obligation to attend and the consequences that follow. The Mahoney Inquiry recently heard evidence that if an Aboriginal person fails to attend certain funerals they will liable to

'community sanctions'.¹² The requirement to attend a funeral may also extend beyond the actual funeral service to associated ceremonies that may last for a number of days.¹³ In Laverton the Commission was told that even when Aboriginal prisoners are permitted to attend a funeral they are not allowed to attend the wake.¹⁴

Specific concerns expressed to the Commission during the consultations were that the criteria for approval for prisoner funeral attendance do not adequately recognise family and kin relationships; that the application process is difficult; and that the use of restraints during funeral attendance (such as handcuffs and shackles) is inappropriate and unnecessary.¹⁵ Similarly, the Inspector of Custodial Services has emphasised that the difficulties experienced by Aboriginal prisoners with respect to funeral attendance require action.¹⁶

Application Process and Defining Family Relationships

Pursuant to s 83 of the *Prisons Act 1981* (WA) a grant of permit may be authorised for a prisoner to attend the funeral of a near relative. The Department of Justice *Policy Directive* (PD) 9 governs the application process for adult prisoners and sets out the relevant criteria. Prisoners are required to complete a written application form.¹⁷ The application is assessed against the eligibility guidelines. PD 9 stipulates that relationships of grandparent, mother, father, sister, brother, son, daughter, husband, wife, defacto husband and defacto wife are close enough to permit attendance at a funeral (if the prisoner is otherwise suitable). Outside these categories the position is not so clear. Other relationships that may justify approval are described in the PD in the following manner:

7. Similarly, concerns about funeral attendance have been expressed to the Inspector of Custodial Services during many of its prison inspections. See, for example, the Office of the Inspector of Custodial Services' inspection reports of Roebourne Regional Prison (2002); Bunbury Regional Prison (2002); Albany Regional Prison (2002); Acacia Prison (2003); Greenough Regional Prison (2003); Broome Regional Prison (2005); Rangeview Juvenile Remand Centre (2005). The issue of funeral attendance was raised during the RCIADIC; recommendation 171 stated that 'Corrective Services give recognition to the special kinship and family obligations of Aboriginal prisoners which extend beyond the immediate family and give favourable consideration to requests for permission to attend funeral services and burials and other occasions of very special family significance': see RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [25.3.15].
8. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 13.
9. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 20.
10. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30-31 July 2003, 5.
11. See discussion under 'Traditional Aboriginal Law and Punishment – Responsibility Under the Law', above pp 84–85.
12. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.57].
13. Ibid [9.67].
14. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.
15. These concerns are not unique to Western Australia; similar complaints have been noted in Victoria: see Blagg H, Morgan N, Cunneen C & Ferrante A, 'Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System' (in press) 146.
16. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Bunbury Regional Prison – December 2002*, Report No 16 (2003) 24.
17. Department of Justice, Policy Directive 9, [1.5]. Prisoners will often complete the written application form with the assistance of a member of the Aboriginal Visitors' Scheme, the Prison Support Officer or a Prison Officer.

Where there has been an emotional, psychological or cultural significance attached to the relationship between the prisoner and the deceased but this relationship is not as described above, for example:

- Where there has been an extensive history of contact between the prisoner and the deceased of a significant nature.
- Where there has been a demonstrated commitment by either the prisoner or the deceased to their shared relationship.
- Where either the prisoner or the deceased have significant community and/or tribal standing necessitating an obligation for attendance of the prisoner at the funeral.
- Where there will be significant negative consequences resulting either to the prisoner, his family or community because of non-attendance of the prisoner at the funeral.
- Where the relationship (between prisoner and deceased) has been that of foster child, foster parent or substitute caregiver.
- The above includes the recognition of a cross-cultural relationship where prisoners of non-aboriginal descent have a recognised standing in the aboriginal community, to attend a funeral of an aboriginal person.

The application process for juvenile detainees is contained in Juvenile Custodial Rule (JCR) 802 which provides that an application to attend a funeral must be made in writing. The guidelines in JCR 802 include that, 'except in special circumstances, attendance should be restricted to blood relatives or relationships of cultural significance'.

Although the guidelines require the consideration of culturally significant relationships, there is no definition of what constitute such a relationship. During the consultations the Commission was told that the prison system does not fully recognise the complexities of Aboriginal cultural ties with extended family members and kin.¹⁸ In Laverton it was stated that the Department of Justice 'questions family connections and does not understand Aboriginal family relationships'.¹⁹ In Bunbury it was argued that Aboriginal family connections need

to be respected within the prison system.²⁰ The view that Aboriginal prisoners experience difficulties in obtaining approval to attend funerals because of a lack of recognition of cultural relationships is supported by the Inspector of Custodial Services:

Aboriginal prisoners viewed the Department's handling of funeral applications as unfair and discriminatory ... displaying a lack of respect for Aboriginal family relationships and a lack of understanding of the significance funeral attendances have for family contact and obligations.²¹

A significant proportion of funeral applications made by Aboriginal prisoners are denied. For the period 1 July 2004 to 30 June 2005, 53.5 per cent of the applications for funeral attendance made by Aboriginal adult prisoners were not approved.²² The previous year, the percentage of non-approved applications was slightly less at 44 per cent.²³ Although the total number of applications by non-Aboriginal prisoners is far less than for Aboriginal prisoners, the proportion of applications that are approved for non-Aboriginal prisoners is more than for Aboriginal prisoners. For example, in 2004–2005 about 70 per cent of applications by non-Aboriginal prisoners were approved.

The Coordinator of Absences at Roebourne Regional Prison²⁴ suggested to the Inspector of Custodial



18. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 15; 22; *Carnarvon*, 30–31 July 2003, 5; *Broome*, 17–19 August 2003, *Bunbury*, 28–29 October 2003, 9.
19. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.
20. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 9.
21. Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Albany Regional Prison – September 2002*, Report No 18 (2003) 36–37.
22. Department of Justice, 'Approved and Non-Approved Applications for Authorised Absences from Prison Showing Decision-Making Agency from 1/7/04 to 30/6/05', obtained by email, 26 October 2005. Approximately 38 per cent of applications made by Aboriginal juvenile detainees were not approved: see Department of Justice, 'Approved and Non-Approved Funeral Applications for Juveniles in Custody 2003/2004 and 2004/2005', obtained by email, 9 December 2005.
23. *Ibid.*
24. Which at the time of the Inspection had an Aboriginal population of 83 per cent: Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No 14 (2003) 16.

Services in 2002 that the most common reason that funeral applications were refused was because the significance of the relationship between the prisoner and the deceased was 'unclear and often identified by prisoners in terms of 'step-family, cousin, aunt and uncle relationships'.²⁵ If an Aboriginal prisoner were to describe the deceased as an uncle without any further explanation, then it is conceivable that prison authorities will not appreciate the cultural significance of the relationship. In terms of kinship the deceased may be as important as a father. There are two issues that require consideration. First, the person considering the application needs to be educated about Aboriginal kinship structures and how they differ from Western family concepts.²⁶ Second, approval of an application may be dependent upon how well the relationship is described in the application form. For Aboriginal prisoners or detainees who do not speak English as their first language, or for those who may not be able to read or write, the knowledge and cultural sensitivity of the person who assists them in making the application will be determinative. Merely stating that the deceased is an uncle is insufficient because on its own this relationship does not fall within any of the criteria listed in the policy guidelines.

Aboriginal communities consulted by the Commission complained that the application procedures were too complex.²⁷ During the Pilbara consultations it was suggested that the forms should be more culturally appropriate and that prison officers who assist prisoners in completing the application form need to be more culturally aware.²⁸ The Commission understands that Roebourne Regional Prison has produced a staff resource manual to advise prison officers of relevant cultural considerations and suggest appropriate ways of confirming information provided by prisoners in their application. For example, the manual states that language and skin group relationships for Aboriginal prisoners should be comprehensively examined and confirmed by speaking to the Chairperson of the relevant Aboriginal community.²⁹ The manual also emphasises that many Aboriginal prisoners do not speak

English as their first language and recommends that, where possible, an appropriate Aboriginal person should be present to assist with communication about the funeral application. The Commission is of the view that this manual provides a useful model to improve the practical implementation of the Department of Justice funeral applications policy.

Proposal 47

That the Department of Justice, in conjunction with Aboriginal communities, develop culturally appropriate policy and procedure manuals for all prisons to assist prisoners and prison officers with applications for attendance at funerals.

In drafting these manuals consideration be given to the potential role for community justice groups in assisting prisoners with the application process. Community justice group members could provide advice to prison authorities about the significance of the prisoner's relationship with the deceased and the importance of the prisoner's attendance at the funeral for the community.

The Commission is of the view that in addition to more effective practical implementation of the funeral policy guidelines, the guidelines should be more appropriately expressed.³⁰ There is presently no reference in the policy guidelines about the nature of kinship in Aboriginal society. The current criteria, which require consideration of the level of contact or commitment between the deceased and the prisoner, may well work against Aboriginal prisoners in practice. A particular relationship may be considered extremely significant from an Aboriginal perspective but this does not necessarily mean that the deceased and the prisoner would have regularly communicated with one another. Lack of contact may result from remoteness, lack of transport or lack of telephone access. The focus should not be on how often the prisoner and the deceased had been in contact but on the significance of the relationship under customary law.

25. Ibid 81.

26. For further discussion see Part VI 'The Role of Kinship in Aboriginal Society', below pp 267–68.

27. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 16; *Laverton*, 6 March 2003, 15; *Carnarvon*, 30–31 July 2003, 5.

28. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 16.

29. Department of Justice, *Roebourne Regional Prison Funeral Applications: Staff resource manual* (undated).

30. The Commission is aware that the Department of Justice had drafted a revised funeral policy in 2003 and that the Inspector of Custodial Services recommended that this policy should be implemented as a priority. See Office of Inspector of Custodial Services, *Report of an Announced Inspection of Broome Regional Prison*, Report No 27 (2005) 49; *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No 14 (2003) 15 where it was observed that the Department of Justice was renewing funeral application processes in regard to kinship issues. The Commission is not aware of the contents of this policy and understands that it has still not been implemented.

The Inspector of Custodial Services has suggested that policy in Queensland is more inclusive of Aboriginal kinship relations.³¹ The Queensland Department of Corrective Services' *Funeral Attendance by Indigenous Prisoners Policy*³² contains the following eligibility criteria for funeral applications:

In some instances the deceased person may have had a closer relationship with the prisoner than is immediately apparent. Kinship within Indigenous cultures often extends close relationship ties where a grandparent or aunt/uncle may assume a parent role, or a cousin a brother/sister relationship. For example, where an aunt has raised a prisoner as a child she may assume a mother figure while her offspring are regarded as brothers and sisters.³³

The Commission considers that the current policy is not adequate to meet the needs of Aboriginal prisoners who are required under customary law to attend certain funerals. The policy should expressly refer to Aboriginal kinship relations.

Proposal 48

That the Department of Justice immediately revise Policy Directive 9 and Juvenile Custodial Rule 802 in relation to attendance at funerals. The eligibility criteria should include recognition of Aboriginal kinship and other important cultural relationships.

Use of Restraints on Prisoners and Detainees During Funerals

Prisoners and juvenile detainees attending funerals may be subject to the use of restraints (including handcuffs and shackles). All adult prisoners are to be restrained unless otherwise directed by the designated Superintendent.³⁴ For juveniles the policy states that mechanical restraints should be used as a last resort.³⁵

The Commission is not aware of the number of prisoners or detainees that are restrained while attending funerals. During the consultations Aboriginal people were extremely critical of the practice.³⁶ In Laverton it was stated that:

Aboriginal people arrive at the funeral in handcuffs (including children). Sometimes they are even shackled. This is not acceptable and undignified.³⁷

In Geraldton it was stated that:

Aboriginal prisoners go to funerals chained up and as a result they cannot show grief appropriately.³⁸

Thus it can be seen that Aboriginal people consider that the use of physical restraints at funerals is disrespectful and causes immense shame to the prisoner and their family.³⁹ In the Pilbara it was stated that Aboriginal people would not run away if unrestrained.⁴⁰ Similarly, in Carnarvon it was said that

It was a 'bloody stupid thing'. People would not run away, 'too much shame'.⁴¹

The Commission considers that the current policy and practice regarding the use of physical restraints during funeral attendances should be reviewed. Certain prisoners, in particular those who are classified as minimum security, should not generally be restrained at funerals. The policy should acknowledge Aboriginal customary law and cultural obligations and keep in mind that Aboriginal prisoners are less likely to escape during such an important ceremony. While there may be situations that require restraints the presumption should be that restraints are generally not to be used at funerals. The Queensland Department of Corrective Services provides a useful model:

Chains attaching handcuffs to officers and/or leg shackles are not to be used for prisoners attending funerals. Where handcuffs are required to be worn, reasonable effort should be taken to hide the handcuffs

31. Office of Inspector of Custodial Services, *Report of an Announced Inspection of Roebourne Regional Prison – April 2002*, Report No 14 (2003) 82.
32. Based on the following principle: 'Recognition is given to the special kinship and family obligations of Indigenous prisoners that extend beyond the immediate family in accordance with recommendation 171 of the Royal Commission into Aboriginal Deaths in Custody'.
33. Queensland Department of Corrective Services' *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.1].
34. Department of Justice, Policy Directive 28 [3.2].
35. Department of Justice Juvenile Custodial Rule 208 [3.4] which also states that 'A Superintendent may authorise and direct mechanical restraint of a detainee where in their opinion such restraint is necessary ... to prevent the escape of a detainee during their movement to and from a Detention Centre or during their temporary absence from a Detention Centre'.
36. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.
37. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 15.
38. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 17.
39. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 39. Similarly in Queensland it has been observed that the practice of restraining prisoners at funerals is degrading and inhumane: see N Morseau-Diop 'You Say You Hear Us, But Are You Really Listening or Are We Just Noise in the Distance?' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology, Sydney, 8–9 October 2001) 5–6.
40. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 11 April 2003, 16.
41. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 5.

from public view. Where handcuffs are hidden from view, escorting officers are required to confirm their integrity at regular intervals.⁴²

Proposal 49

That the Department of Justice should review and revise its current policy in relation to the use of physical restraints on prisoners and detainees during funeral attendances. The revised policy should recognise the importance of Aboriginal prisoners attending funerals in a dignified and respectful manner. Physical restraints should only be used as a last resort and, if required, they should be as unobtrusive as possible.

Escorting Prisoners and Detainees to Funerals

The Commission consultations did not directly refer to problems with escorting prisoners and detainees to funerals. The appropriateness of staff escorting prisoners to funerals was raised by the Inspector of Custodial Services in 2003 following an Inspection of Greenough Regional Prison. The report of that Inspection highlighted:

[T]he skill to assist Aboriginal prisoners at the time of great sorrow is underdeveloped. There is a need for better cross-cultural training at a local level, improved coordination of various departmental Aboriginal welfare services and streamlined local and Head Office procedures.⁴³

While the majority of adult prisoner funeral escorts are conducted by AIMS Corporation, minimum-security prisoners at Karnet, Wooroloo and Boronia custodial facilities, are escorted to funerals by custodial staff.⁴⁴ For juvenile detainees all escorts are undertaken by detention centre staff.⁴⁵ The Commission is not aware of any further guidelines in relation to the nature of

escorts to funerals. The Queensland Department of Corrective Services policy on this issue states:

Escorts should be conducted in accordance with the procedure for Prisoner Escort with particular consideration being given that:

- Wherever possible Indigenous custodial officers undertake escort duties;
- Civilian (plain) clothes be worn by the prisoner and escorting staff where possible; and
- Prior to commencing escort the escorting officers be adequately briefed on the circumstances and procedures of the escort. The briefing will include the sensitivity and cultural significance of the occasion and require the escorting officers to display appropriate behaviour and sensitivity.⁴⁶

An initiative of the South Australian Department of Correctional Services, which commenced in 2004, enables local Indigenous people to supervise prisoners who are attending funerals on their lands (under Aboriginal Community Supervision Agreements). There are currently four communities that have entered into these agreements and over 12 community members have been selected for training as volunteer supervisors.⁴⁷

The Commission is of the view that the policy and practice concerning the escort of prisoners and detainees to funerals should be re-examined paying particular attention to ensuring that any escort arrangements are culturally sensitive and do not intrude unnecessarily on the grieving process of the prisoner and the community.

Proposal 50

That the Department of Justice revise, in conjunction with Aboriginal communities, its policy concerning the escorting of Aboriginal prisoners and detainees to funerals.

42. Queensland Department of Corrective Services, *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.4].

43. Office of Inspector of Custodial Services, *Report of an Announced Inspection of Greenough Regional Prison – May 2003*, Report No 21 (2004) 50. The need for specific cultural awareness in relation to escorting prisoners to funerals was also referred to in N Morseau-Diop 'You Say You Hear Us, But Are You Really Listening or Are We Just Noise in the Distance?' (Paper presented at the Best Practice Interventions in Corrections for Indigenous People Conference convened by the Australian Institute of Criminology, Sydney, 8–9 October 2001) 6.

44. PD 28, [5.1.6].

45. In 2004 the responsibility for juvenile custodial transport was transferred back to the Juvenile Custodial Services (DOJ) from AIMS: see Office of the Inspector of Custodial Services, *Report of an Announced Inspection of Rangeview Juvenile Remand Centre*, Report No 29 (2005) 18–19.

46. Queensland Department of Corrective Services, *Funeral Attendance by Indigenous Prisoners Policy* (undated) [3.4].

47. The Department of Justice Correctional Services South Australia, *Annual Report 2003–2004* (Adelaide, 27 October 2005) also states that a 'culturally appropriate training package has also been developed for Port Augusta custodial officers involved in escorts to the Anangu Pitjantjatjara Yankunytjatjara Lands. Once operational, funeral leave under these Agreements for Anangu prisoners will be more culturally sensitive and humane, whilst also meeting the Department's commitment to the RCIAIC recommendations'.

In reviewing all relevant policies and practices in regard to the attendance at funerals by Aboriginal prisoners and detainees, the Commission understands that community safety and the prevention of escapes is a paramount consideration. However, the current regime is clearly not working for Aboriginal people. The customary law obligation to attend funerals should not be underestimated. The Commission believes that the policies should be revised in collaboration with Aboriginal communities and groups to ensure that all relevant matters are taken into account and practical workable solutions are developed.

Parole and Post Release Options for Aboriginal Prisoners

Parole and Aboriginal Customary Law

When an offender is sentenced to imprisonment a court will decide whether the offender is eligible to be released on parole. Similarly, juvenile offenders are eligible to be released on a supervised release order. The decision whether to allow the offender to be released is made by the Parole Board (for adults) or by the Supervised Release Board (for juveniles). Aboriginal customary law may be relevant to the decision to grant or deny parole or release on a supervised release order. For example, the Parole Board advised the Commission that it has been aware that in some cases, upon release from prison, an offender may be liable to traditional punishment in their own community. In the same way that courts have approached the issue, the Parole Board is unable to 'sanction' or 'condone' traditional punishment which constitutes a criminal offence.⁴⁸

The Parole Board suggested that reports prepared by community corrections officers do not contain sufficient information about cultural issues.⁴⁹ In order to encourage more information about Aboriginal customary law and cultural issues the Commission is of the view

that the Parole Board and the Supervised Release Board should be able to receive information from Elders or members of a community justice group.

Proposal 51

That the *Sentence Administration Act 2003* (WA) and the *Young Offenders Act 1994* (WA) be amended to provide that the Parole Board and the Supervised Release Board can request to be provided with information or reports from a respected Elder in the offender's community or a member of a community justice group.

Lack of Programs and Services

The Commission has already emphasised the lack of suitable programs and services available for Aboriginal prisoners.⁵⁰ This issue has also been comprehensively examined by the Inspector of Custodial Services and the Mahoney Inquiry. The Parole Board has also expressed its concern about the shortage of programs for Aboriginal prisoners in regional prisons. The Parole Board has observed that often the only way for an Aboriginal prisoner to access programs is to transfer to another prison sometimes long distances from the offender's community. This adds to cultural and community dislocation.⁵¹ The extent to which a prisoner has engaged in programs while in prison is a consideration for the Parole Board in their determinations.⁵² The lack of Indigenous-specific programs and services in prisons may therefore cause delays in being released on parole.

The Parole Board suggested that Aboriginal Elders could become more involved in supervising offenders while subject to parole.⁵³ Many Aboriginal people consulted by the Commission supported the involvement of Aboriginal people in the provision of programs for offenders with a focus on Aboriginal culture and community responsibility.⁵⁴ The Commission is of the view that its proposal for community justice groups will

48. LRCWA, Project No 94, Notes of Briefing with the Parole Board and the Supervised Release Board of Western Australia, 12 August 2003.

49. Ibid.

50. See discussion under 'Aboriginal People and the Criminal Justice System – Programs and Services', above p 100. For an examination of the programs and services available within the prison system, see Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004). The general lack of programs and services in regional prisons was also reiterated during the Commission's consultations with members the Parole Board and the Supervised Release Board of Western Australia: see LRCWA, Project No 94, Notes of Briefing with the Parole Board and the Supervised Release Board of Western Australia, 12 August 2003.

51. Parole Board of Western Australia, Annual Report (June 2005) 8,12.

52. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 113.

53. Ibid.

54. See for example LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002, 5; *Armada*, 2 December 2002, 17.

provide one method whereby Aboriginal communities can become more directly involved in the provision of programs and services to Aboriginal prisoners and detainees.

Aboriginal Community-based Alternatives to Prison

A large number of Aboriginal prisoners are sent to prisons which are not the closest available prison to their home and community. The national standards for correctional facilities provide that prisoners should be as close as possible to their homes.⁵⁵ The Mahoney Inquiry identified that as at 30 June 2005 there were 343 Aboriginal regional prisoners placed in prisons 'other than the one closest to their home'.⁵⁶ The Mahoney Inquiry as well as the Inspector of Custodial Services has recommended the development of additional custodial facilities in specific regional areas, including Aboriginal community-based facilities for low risk offenders.⁵⁷

Many Aboriginal people consulted by the Commission suggested the need for community-based alternatives to prison. Underlying these suggestions was the need to keep Aboriginal offenders near their communities, families, and country and utilise Aboriginal customary law processes in rehabilitating offenders. Aboriginal people consulted by the Kimberley Aboriginal Reference Group have also indicated strong support for alternatives such as work camps, 'healing places' and specific pre-release facilities for female prisoners.⁵⁸ This reference group suggested that the Boronia Pre-Release Centre for Women is an 'excellent model for

the kind of facility that would suit the custodial, rehabilitation and re-entry needs of Kimberley Aboriginal prisoners'.⁵⁹ Similarly, 'healing lodges' for indigenous peoples in Canada were put forward as a useful example.⁶⁰

The establishment of additional and improved custodial facilities, whether they are community-based or government controlled, will assist in reducing the numbers of Aboriginal prisoners that are placed long distances from their families and communities. It may also assist with other problems experienced by Aboriginal prisoners. For example, some Aboriginal prisoners are required to find their own transport back to their community even where a long distance from the place of release.⁶¹ Morgan and Motteram observed that travel arrangements are a significant concern to the Parole Board and in some cases release may be delayed until satisfactory arrangements can be made.⁶² Funeral applications for Aboriginal prisoners may also be more readily approved if the prisoner does not have to be transported long distances to attend.

The Commission supports these recommendations to develop Aboriginal community-based custodial facilities in regional areas. This approach is consistent with the Commission's overall aim to increase the involvement of Aboriginal people in criminal justice issues as well as providing opportunities for Aboriginal customary law processes to rehabilitate Aboriginal offenders. Community justice groups proposed by the Commission could undertake a direct role in the design and implementation of alternative community-based custodial facilities.

55. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 2.

56. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.74].

57. Mahoney D, *Inquiry into the Management of Offenders in Custody and in the Community* (November 2005) [9.78] Recommendations 89–91; Office of Inspector of Custodial Services, *Directed Review of the Management of Offenders in Custody*, Report No 30 (November 2005). The Commission is aware that the Department of Justice has announced plans to develop two new regional juvenile remand centres, one in Kalgoorlie and one in Geraldton: see Department of Justice, *Regional Juvenile Remand Centres* (undated) 1.

58. Kimberley Aboriginal Reference Group, 'Kimberley Aboriginal Reference Group's Initial Recommendations Toward the Kimberley Custodial Plan' (October 2005) 4.

59. Ibid 3. The Boronia Pre-Release Centre for Women commenced operation in May 2004. It has been commented that this centre sets 'new standards' for custodial design and reform: see Salomone J, 'Addressing the Needs of Aboriginal Women Prisoners and their Families in Western Australia' (2005) 6(14) *Indigenous Law Bulletin* 17. Salomone commented that about 15 per cent of the prison population at the Boronia Centre were Aboriginal.

60. Kimberley Aboriginal Reference Group, *ibid*. Chris Cunneen and Melanie Schwartz observed in their background paper that in Canada sentencing laws provide for Indigenous offenders to serve their sentences in Indigenous community-based 'correctional centres': see Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some conceptual issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 36.

61. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 5; *Cosmo Newbery*, 6 March 2003, 20; *Kalgoorlie*, 25 March 2003, 27; *Pilbara* 11 April 2003 16.

62. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 124.

PART VI

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Aboriginal Customary Law and the Civil Law System

This Part examines Aboriginal customary law in the areas of contractual arrangements; tortious acts or omissions; personal property and succession (inheritance); guardianship and administration; coronial and burial matters; and Indigenous cultural and intellectual property. As mentioned earlier, although it is not always easy (or indeed desirable) to render Aboriginal customary laws into general law categories, it is useful for the purposes of this discussion and for ascertaining the potential of recognition of Aboriginal customary law in Western Australia.¹ Of course, the Commission acknowledges that there are fundamental differences between Aboriginal and non-Aboriginal conceptions of law and society that can significantly distort discussion in these categories.² For this reason the Commission has approached each area by looking first at evidence of relevant Aboriginal customary laws, then contrasting the traditional position with the general law in Western Australia and noting any similarities and differences. The prospect of problems with the clash of Aboriginal and non-Aboriginal understandings of law in these areas is then discussed and the need for recognition of relevant Aboriginal customary laws is considered.

It is worth noting at this point that there are many matters contained in the civil laws of Western Australia and the Commonwealth that are not traditionally

covered by Aboriginal customary law but that necessarily affect Aboriginal people and can create rights and responsibilities for all Australians. Laws governing commercial contracts, consumer protection, tax and superannuation, insurance and workers' compensation are a few examples. The Commission is aware of issues in some of these areas where the law can work to the disadvantage of Aboriginal people. Where relevant to the discussion at hand, these issues are also raised.

The Role of Kinship in Aboriginal Society

Before turning to the discussion of recognition of Aboriginal customary law in the civil law system it is necessary to understand the role of kinship in Aboriginal society. Kinship is at the heart of Aboriginal society and underpins the customary law rules and norms associated with each of the areas to be discussed in this Part. Importantly, kinship governs all aspects of a person's social behaviour and prescribes the obligations or duties a person has toward others as well as the activities or individuals that a person must avoid.³ Robert Tonkinson explains the kinship system thus:

Social relationships in which people refer to each other using terms of biological relatedness such as 'mother', 'son', 'cousin' are called kinship systems. In Aboriginal society everybody with whom a person comes into contact is called by a kinship term, and social interaction is guided by patterns of behaviour considered appropriate to particular kin relationships. Although a person's sex and age are important in determining social status, the system of relatedness largely dictates the way people behave towards one another, prescribing dominance, deference, obligation or equality as the basis of the relationship.

Aborigines employ what is known as a 'classificatory' kinship system; that is, the terms used among blood relatives are also used to classify or group more distantly related and unrelated people. Classificatory



1. See the discussion in the introductory chapter, above pp 1–6.

2. Many of these differences are discussed by Greg McIntyre in his Background Paper to this reference: see McIntyre G, *Aboriginal Customary Law: Can it be Recognised?*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 9 (February 2005) 31–36.

3. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 144.



systems are based on two principles. First, siblings of the same sex (a group of brothers or a group of sisters) are classed as equivalent in the reckoning of kin relationships. Thus my father's brothers are classed as one with my father and are called 'father' by me; likewise, all women my mother calls 'sister' are my 'mothers'. Following this logic, the children of all people I call 'father' or 'mother' will be classed as my 'brothers' and 'sisters'. Secondly, in theory this social web can be extended to embrace all other people with whom one comes into contact in a lifetime.⁴

Not all Aboriginal kinship systems are the same but they do tend to share the basic principles addressed in the preceding extract.⁵ Essentially, in Aboriginal society, kinship should be understood as a circular concept rather than a linear one as is the norm in non-Aboriginal society.

It is important to note at this stage that whilst the kinship system was an undeniable part of traditional Aboriginal society, the Commission found, during its community consultations, that it is also strongly instilled in contemporary Aboriginal society, including urban Aboriginals. Therefore, whilst there may be some utility in the distinction between the extent to which remote Aboriginal people and urban Aboriginal people engage with (and accept the authority of) Aboriginal customary law, there is less of a distinction between remote and urban Aboriginals in relation to conceptions of kinship and acknowledgement of the obligations imposed by the kinship system.⁶

4. Tonkinson R, 'Mardu Jarra Kinship', as cited in McRae H, Nettheim G & Beacroft L (eds), *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 83.

5. Vines P, 'When Cultures Clash: Aborigines and Inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 108.

6. The extent to which these obligations are actually observed by more urbanised Aboriginal people will, of course, vary. However, it appears that certain kinship obligations, such as the duty to accommodate kin, are taken very seriously regardless of urban or remote location.

Tortious Acts and Omissions

Australian Tort Law

At common law the legal branch of torts has developed to provide redress for wrongful acts or omissions that have caused injury (physical or economic) to another person. The principal objects of tort law are to deter wrongdoing and to compensate losses arising from conduct contravening socially accepted values.

Legal liability in tort generally arises where an act done or omission made has caused a party identifiable damage in circumstances where a duty of care exists between the tortfeasor (the wrongdoer) and the party that is wronged, and that duty is breached. Whether a duty of care exists under Australian law will generally¹ depend upon whether the damage was reasonably foreseeable and whether there is a sufficient degree of proximity (or factual closeness of relationship) between the tortfeasor and the injured party. The fundamental principle underlying tort law is liability based on individual fault.²

An Aboriginal Customary Law of Tort?

Some believe that Aboriginal customary law and Australian law are irreconcilable in their notions of 'tort'.³ In some important respects, for instance in regard to principles of fault and liability, this belief is true. However, there are many commonalities between general law notions of negligence and duty of care and Aboriginal customary law kinship obligations that are worth exploring in the context of this reference.

Kinship Duties under Aboriginal Customary Law

The notion of kinship and its role in Aboriginal society is discussed above. It was noted there that the Aboriginal conception of kinship governs a person's rights and duties towards others under Aboriginal customary law. Significantly, Tonkinson has observed that kinship is 'undeniably the most important single factor in structuring Aboriginal social relationships'.⁴

There are a number of kinship duties which have come to the attention of the Commission in the course of its research for this reference and which are broadly relevant to the area of tort law. These can be grouped under the headings of duty to care for and support kin; duty to protect certain kin; and a more general duty of care in relation to negligent acts or omissions.

Duty to care for and support kin

This duty broadly requires that Aboriginal people 'care for and support those whose kin relationship demands it'.⁵ Care and support entails, among other things, the duty to accommodate extended family and to share resources.⁶ In Western eyes, the duty to care for and support kin might appear to be an unenforceable social obligation, perhaps with minor social consequences for breach. However, kinship obligations appear to have a 'law-like status'⁷ in Aboriginal society and the binding nature of these obligations and the characteristic of enforceability arguably render them more akin to laws than to social norms or moral precepts. Anthropological evidence indicates that, at least in some Aboriginal

1. There are certain recognised categories of relationship where a positive duty of care attaches; for example, parent/child, doctor/patient, teacher/student, etc.
2. Gardiner D, *Outline of Torts* (Sydney: Butterworths, 1992) 14.
3. Stanner WEH, *White Man Got No Dreaming: Essays 1938–1973* (Canberra: ANU Press, 1979) 93. It is recognised that Aboriginal customary law did not have a notion of 'tort' per se; however, as will be seen in this section, customary law redress for wrongs in breach of kinship duties provides useful comparisons to the Australian law of tort.
4. Tonkinson R, 'MarduJarra Kinship', as cited in McRae H, Nettheim G & Beacroft L (eds), *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 83.
5. Ibid.
6. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 10.
7. Tonkinson R, 'MarduJarra Kinship', as cited in McRae H, Nettheim G & Beacroft L (eds), *Indigenous Legal Issues* (Sydney: LBC Information Services, 2nd ed., 1997) 85.

groups, offences of omission in regard to the duty to care for and support kin (such as physical neglect of certain relatives and refusal to educate certain relatives) can be met with both social and physical punishment in the event of breach.⁸ This serves to demonstrate the seriousness of breach of kinship obligations at customary law.

Duty to protect certain kin

Elkin describes the duty to protect certain kin in the following case study from the Northern Kimberley.

An old man had died and left two widows, the younger one of whom was 'willed' to a certain man ... This was known by the tribe. She, however, reciprocated the attentions of a younger tribal brother of the inheriting husband, and went away with him three times. The husband, being incensed, prevailed on ... a warrior to assist him kill the [younger man]. The latter was apparently decoyed out by a third man on the pretext of hunting, to a pre-arranged place where the warrior hurled two spears into his back and the aggrieved husband rushed up and finished him off. The two of them buried the body.⁹

Under customary law all three men involved were guilty to differing degrees. The warrior who cast the spears that probably killed the victim was 'the least guilty of the three'.¹⁰ He had confessed his part and had suffered physical payback and reprimand. The husband had fled but would be severely dealt with when caught because he had gone beyond what was allowable under customary law as punishment for the victim's conduct.¹¹ According to Elkin, the most guilty of the three men under Aboriginal customary law was the man who had lured the victim into a place where the other two would have an opportunity to kill him. This man was guilty 'not because of a general principle of protecting people from danger, but because the two were related as brothers-in-law, and, in this area, persons so related must protect each other throughout life'.¹² The customary law penalty for breach of this duty was death.

This case study indicates that the duty to protect certain kin is regarded as a positive duty to act to avoid

or prevent harm. Where a person fails in this duty by omitting to act or by wilfully ignoring the duty to act, he or she will be dealt with severely. The fact that the two men were related as brothers-in-law was important to the finding of liability and the degree of punishment required under customary law. Although the man did not directly cause the victim's death, their relationship as brothers-in-law was built on reliance and an assumption of responsibility based on a custom of guardianship through initiation.¹³ Taking into account the special relationship at customary law (which might satisfy the requirement of proximity and duty to act), such facts might also give rise to tortious liability under Australian law.

Duty of care in relation to negligent acts or omissions or in relation to accidents

An injury caused by negligence, whether by direct act or by omission, is also actionable under customary law. Although direct causation of harm is relevant to a finding of liability under customary law, circumstantial factors also influence liability. Thus, as with Australian law, liability attaches when a person is in a special relationship to the injured party or where the person has otherwise assumed responsibility for the injured party and has failed to exercise a reasonable standard of care. For example, if a child is harmed when another is 'responsible' for the child, that party will be held liable despite the fact that the harm was not caused by that person.¹⁴

During consultations in Wiluna the Commission was advised that a concept of moral responsibility also existed under Aboriginal customary law that would 'widen the net' of individuals who might be held liable for a breach of a general duty of care. In some cases, it was said, an entire family might be punished for a negligent or accidental death of a child because they stand in a special relationship with the child.¹⁵

Consultations with Aboriginal communities in Wiluna, Warburton, Cosmo Newbery and Midland indicated that under customary law people carry a much greater liability for failing to prevent an accident than under

8. Social punishment includes ridicule or shaming of offenders; physical punishment would usually take the form of illness caused by sorcery or assault with a club or boomerang. See Meggitt MJ, *Desert People* (Sydney: Angus & Robertson, 1962) 256–57, as cited in Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 32–33.

9. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 144–45.

10. Ibid 145.

11. Ibid 146. Elkin indicates that such conduct would usually have earned the victim (and the inherited wife) a severe beating under Aboriginal customary law rather than death.

12. Ibid.

13. Ibid.

14. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 10.

15. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 27.

Australian law. In each place a local example of customary punishment following a fatal car accident was given. It was said that all individuals involved in a fatal car accident were liable to Aboriginal law punishment, not just the driver (as would likely be the case under Australian law). Indeed, a recent article in the *Sunday Times* referred to a 1970s case where some 30 people faced payback for a country car crash that killed several people. It was reported that some people, who were not themselves physically involved in the accident, 'faced punishment for quite obscure reasons'.¹⁶ This example supports the existence of the concept of moral responsibility discussed in the preceding paragraph. At Warburton the Commission was also told that survivors must face each of the families of those who were killed to accept their punishment under customary law, indicating that a person may be punished more than once. The customary law response to an offence of this nature may be as serious as wounding.¹⁷

Differences between Australian Law and Aboriginal Customary Law in the Area of Tort

Duty of care

Although there are some similarities between Australian law and Aboriginal customary law in relation to the concepts of negligence and duty of care, there is a fundamental difference in relation to the nature of duties and the range of people to whom these duties are owed at customary law. Significantly, many of the duties recognised under Aboriginal kinship rules would be regarded as social or moral obligations under Australian law and would not invite a legal penalty for breach. Under Australian law a legal duty of care will, in most cases, arise only where the injury or damage sustained is reasonably foreseeable and there is a relationship of proximity between the parties. Although the requirement of proximity is reasonably broad—in that it may be physical (time and space), circumstantial

(reliance or assumption of responsibility) or causal—it is unlikely that Australian law would recognise, for example, a relationship between a person and their father's sister's daughter as one of sufficient proximity to give rise to a duty of care in the absence of a direct causal act. However, under most kinship rules this relationship would be regarded as a sibling relationship and would likely give rise to particular kin obligations which may dictate a traditional duty of care.

Liability

The examples of customary law kinship duties discussed above indicate that the principal concept underlying Australian tort law) that is, liability based on individual fault) is displaced at customary law by a broader concept of moral responsibility. It appears that, at customary law, liability for a negligent act or omission may lie not only with the wrongdoer but also with those who are in a special relationship with the injured party, often irrespective of cause or reasonable foreseeability of injury. Moreover, the liability attaching to breach of kinship obligations or tortious offences is generally a strict liability without opportunity for defence.¹⁸

Remedies (or responses) for breach of duty

Customary law responses to the breach of kinship duties can vary and are not always commensurate with the harm caused.¹⁹ Responses can range from social penalties (such as ridicule, shaming or ostracism) to physical penalties (such as battery or wounding). As the example extracted under the discussion of the duty to protect certain kin demonstrates, the customary law response can be as serious as death. It is worth noting here that the characterisation of a particular customary law response as 'social' rather than 'physical' should not necessarily be taken to indicate a less serious breach of obligation. In this regard it should be remembered that social penalties are likely to be far more seriously regarded in Aboriginal society where the notion of kinship and community underpins a person's

16. Taylor N, 'And Justice for All', *Sunday Times*, 1 May 2005, 43, 44.

17. Such was the case following a fatal car accident in Kiwirrkurra in the remote east of Western Australia where the five survivors of the accident were 'set upon' by members of the community and at least one person was stabbed. See 'Person Stabbed in Possible Retribution for Fatal Car Rollover', *Message Stick Online*, 26 May 2003. Another example is mentioned in Toussaint S, *Phyllis Kaberry and Me: Anthropology, history and Aboriginal Australia* (Melbourne: Melbourne University Press, 1999) 89–91 where it is stated that both the driver of a vehicle and the person who asked that person to drive, despite being tired, were punished for the death of two passengers.

18. Although young children are not usually held responsible for breach of kinship obligations: see Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 340.

19. Although, as Meggitt's example of the duty to protect kin shows, there is generally an implicitly understood 'appropriate' response to the commission of certain wrongs.

entire existence than in non-Aboriginal society which is generally predicated on the concept of the nuclear family underwritten by individualism.

What emerges from the Commission's consultations and from relevant anthropological research is that the object of responses at customary law to the breach of kinship obligations is generally punishment rather than compensation.²⁰ There is, in this regard, an apparent difference between Aboriginal law and Australian law, which is based on the compensatory principle of returning the injured party to the position (as far as is possible) that they were in before the wrong occurred. However, it could compellingly be argued that responses for tortious wrongs under Aboriginal customary law are compensatory in the sense that their primary purpose is to restore harmony to a family or community rather than exact 'revenge' for the harm suffered.²¹

Further, the breach of kinship duties does, like Australian tort law, appear to be a private law matter²² and will not generally involve the tribe or tribal leaders in enforcing a response unless perhaps there is some public wrong or breach of sacred trust involved.²³

Recognition of Aboriginal Kinship Obligations

It is the Commission's opinion that the content of Aboriginal kinship obligations and remedies in response to their breach is a matter for Aboriginal people alone and should not be subjected to unnecessary interference by Australian law. As noted above, in many cases the kinship duties owed by Aboriginal people under customary law are in the nature of social obligations (at least in the eyes of Australian law) and are therefore not the proper subject of state control.²⁴

However, there are areas in which the state can assist Aboriginal people to fulfil their kinship obligations at

customary law. One area which has come to the particular attention of the Commission is that of public housing. Recognition by public housing authorities of the special duty under Aboriginal customary law to accommodate kin by the implementation of meaningful change to current housing provision programs and by cultural awareness training of staff will go some way to assisting Aboriginal people to fulfil kinship duties. Other issues associated with the provision of public housing to Aboriginal people in Western Australia are canvassed in Part II of this paper.²⁵

Recognition of the Special Position of Aboriginal People under Australian Tort Law

Although not in the nature of recognition of Aboriginal customary laws of tortious equivalence, Australian common law has developed to recognise the special position of Aboriginal people in relation to torts committed against them. Both cultural and demographic factors are relevant in the assessment of damages for personal injuries suffered by Aboriginal people. For example, in *Napaluma v Baker*²⁶ a young full-blood²⁷ Aboriginal man was injured in a car accident. He was awarded damages for loss of amenities which included substantial compensation for loss of position within his tribe. In assessing damages in this case the judge recognised that, because of his injuries, the man would no longer be able to fully participate in tribal life:

The plaintiff has been through the ceremonies of the Aboriginal community up to date and has been made a man. However, in the ordinary course of events, further secrets would be entrusted to him and he would ... rise to higher degrees. It is now certain that the plaintiff will not be advanced to further degrees in tribal lore ...²⁸

20. The Commission is aware that compensation may be sought instead of punishment for certain contractual types of wrongs—such as breach of contract for an arranged marriage—and although no evidence of it was discovered, the Commission acknowledges that there may be instances at customary law where a compensatory response is sought for a tortious wrong.

21. For further discussion of the restorative or healing nature of customary law dispute resolution see Part V 'Features of Aboriginal Dispute Resolution', above p 87.

22. In Australian law, unless the tort is also a crime (where proceedings are state-initiated), the wrong is redressed by proceedings initiated by parties to vindicate private rights and are remedied by general compensatory damages.

23. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1 'Understanding Aboriginal Law', 27. Customary law offences of a public or sacred nature are discussed in Part V above.

24. However, it is noted that some customary law responses (such as wounding or battery) to breach of kinship obligations may attract the attention of the criminal law. In the event of customary law responses being subject to criminal charge, relevant customary law circumstances should be taken into account by the judge in exercise of judicial discretion. See discussion in Part V above.

25. See Part II 'Housing and Living Conditions', above pp 38–42.

26. (1982) 29 SASR 192.

27. Although the plaintiff in *Napaluma* was a full-blood Aboriginal, cultural loss of a part Aboriginal may also give rise to damages: *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1.

28. (1982) 29 SASR 192, 194.

It is the Commission's opinion that the content of Aboriginal kinship obligations and remedies in response to their breach is a matter for Aboriginal people alone.



The inability to participate fully in cultural life has also been recognised in relation to Aboriginal women. In *Namala v Northern Territory*²⁹ a negligently performed caesarean section resulted in a hysterectomy. The Aboriginal woman concerned was awarded damages for loss of amenities in recognition of the importance of women in her tribe to have daughters in order to fully participate in women's business.

Other cultural factors that may be taken into account in the assessment of damages in relation to Aboriginal people are:

- loss of cultural fulfilment;³⁰
- inability to complete initiation rites (and consequent effect on prospects of marriage);³¹

- inability to gain and enjoy full tribal rites;³²
- loss of ceremonial function;³³
- inability to partake in matters of spiritual tribal significance;³⁴ and
- loss of standing in tribal group.³⁵

However, it should be noted that the extent to which the person has maintained traditional culture will be taken into account in the assessment of damages for loss of amenities and pain and suffering.³⁶ Additionally, a plaintiff's Aboriginality may result in reduced damages for future economic loss where factors such as lower life expectancy of Aboriginal people,³⁷ their shorter working life³⁸ and place of residence³⁹ may be taken into account.

29. (1996) 131 FLR 464.

30. *Dixon v Davies* (1982) 17 NTR 31, 34.

31. *Ibid* 34–35.

32. *Ibid* 34; *Napaluma v Baker* (1982) 29 SASR 192, 194.

33. *Napaluma*, *ibid* 194; *Weston v Woodroffe* (1985) 36 NTR 34, 45.

34. *Napaluma*, *ibid*; *Dixon v Davies* (1982) 17 NTR 31, 35.

35. *Dixon*, *ibid* 34.

36. See *Halsbury's Laws of Australia* [5-4510].

37. *Dixon v Davies* (1982) 17 NTR 31, 34.

38. *Ibid*.

39. *Jabanardi v AMP Fire and General Insurance Co Ltd* (Unreported, Northern Territory Supreme Court, Forster CJ, 19 November 1980). In this case damages for future economic loss were reduced because the plaintiff lived in a tribal state which meant that food and housing were considerably cheaper.

Contractual Arrangements

The Commission is directed by its Terms of Reference to have regard to matters of Aboriginal customary law 'performing the function of or corresponding to' particular areas of law including, specifically, contractual arrangements. This is an area that has not received a great deal of attention in past inquiries and did not feature widely in discussions of customary law with Aboriginal people during the Commission's consultations. Nonetheless, investigation into the existence of Aboriginal contractual arrangements and the rules governing such arrangements can inform our understanding of Aboriginal customary law and assist the recognition process.

The Existence of Aboriginal Contractual Arrangements

In Australian law the formation of a contract is dependent upon the presence of three main elements: an exchange of promises between two parties; 'consideration' or benefit flowing from one party to the other as the 'price of the promise'; and an intent to create binding legal relations. However, 'the principal characteristic which distinguishes a contract from most other agreements is the quality of enforceability'.¹ There are some agreements in traditional Aboriginal society that immediately meet this description and which indicate that a conception of contract, as we know it in Australian law, also existed in that society.

The best example is perhaps found in traditional Aboriginal 'promised' marriages.² Such arrangements appear to bear the fundamental elements of a contract in that they show an agreement by the exchange of promises between two parties (usually the families of the betrothed) accompanied by the furnishing of

consideration (usually gifts or services provided by the promised husband to the girl and her family).³ That such agreements were intended to be binding is shown in the potential of significant sanction if a marriage contract was breached.⁴

The evidence of extensive trade routes throughout Australia, indicating the economic exchange of goods between various Aboriginal groups, also supports the view that a commercial conception of contract existed in traditional Aboriginal society. The following passage describes the extent of trading conducted by Aboriginal groups from the north-west of Western Australia:

[F]rom the Kimberley coast come pearlshells of various kinds, plain and incised, also bamboo necklaces, and certain types of boomerang. They are passed along, on one track, through the eastern Kimberleys: and back from the east come shovel-bladed spears with bamboo shafts, hooked spears, a variety of boomerang, wooden coolamon dishes, dilly bags, and red ochre. The Lungga say they cannot make boomerangs properly: they prefer to import them from the east, west or south-west. The Walmadjeri trade their shields to the east, and Central Australian shields find their way into the Balgo camp near the head of the Canning Stock Route, just as do the typical Western Desert spearthrowers – into an area where the local throwers are quite differently designed. Kimberley pearlshells travelled right across Australia: one road down to Eyre's Peninsula in South Australia. Through the Great Victorian Desert and Ooldea: another also to the Great Victorian Desert and Eucla, but via the Gascoyne and Murchison.⁵

Without more, the exchange of goods between groups or individuals would usually be considered mere barter,⁶ but there is evidence that trade in traditional Aboriginal societies was much more sophisticated⁷ and relied heavily

1. Hocker PJ, Dufty A & Heffey PG, *Contract: Commentary and materials* (Sydney: Law Book Company, 6th ed., 1990) 1.

2. Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 24.

3. See Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 336. Ellinghaus also highlights the significant economic aspects to the marriage contract in traditional Aboriginal society: *ibid*.

4. Such sanctions can range from the payment of compensation to punishment by death: *ibid*. The practice and potential for recognition of promised marriages is discussed further in Part VII, below pp 332–33.

5. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal Traditional Life Past and Present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 128.

6. Hocker PJ, Dufty A & Heffey PG, *Contract: Commentary and Materials* (Sydney: Law Book Company, 6th ed., 1990) 1.

7. Anthropological studies indicate that Aboriginal societies not only traded goods, but also services and the rights to use ceremonial designs and performances. See Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 22–23. Ellinghaus cites numerous anthropological sources in his discussion of this issue, among them works by Berndt, McCarthy, Meggitt and Howitt.

on the contractual concepts of bargain,⁸ promise, obligation and enforceability.⁹ Manfred Ellinghaus has observed that '[p]romises to make goods, or to supply goods yet to be acquired, were also recognised, and their breach was subject to sanction'¹⁰ indicating the presence of forward-planning and the enforceability of promises as to future action.¹¹

Anthropologists Catherine and Ronald Berndt have identified six main types of goods exchange in traditional Aboriginal society:

- kinship exchange (including distribution of goods and services in relation to traditional marriage contracts);
- gifts made to settle grievances or debts;
- gifts in return for services or for goods;
- formalised gift exchange, involving trade between various defined partners or groups;
- general trade; and
- ceremonial gift exchange.¹²

Although many of these exchanges are grounded in kinship obligation, Ellinghaus has argued that 'their economic aspects were at least as important'.¹³ Nonetheless, it is apparent that some exchanges are more commercial in nature than others. This raises the question whether these exchanges are governed by some kind of customary law of contract or whether they are governed merely by religious or social norms which Aboriginal people are expected to adhere to but which are not necessarily enforced.

An Aboriginal Customary Law of Contract?

The discussion above indicates that a concept closely resembling the modern Australian law of contract may have regulated agreements and transactions between

individuals, groups and trading partners. However, a strong social dimension, not mirrored in Australian law, can also be discerned in the various types of contractual arrangements in traditional Aboriginal society. For example, kinship obligation and reciprocity appear to play a central role in Aboriginal contractual arrangements. Berndt and Berndt have observed that:

In this network of duties and debts, rights and credits, all adults have commitments of one kind or another. Mostly, not invariably, they are based on kin relationships. All gifts and services are viewed as reciprocal. This is basic to their economy – and not only to theirs, although they are more direct and explicit about it. Everything must be repaid, in kind or in equivalent, within a certain period.¹⁴

Accordingly, exchanges take place in a 'framework of assumptions about the ways in which other people will, or should, respond'.¹⁵ Another feature of Aboriginal commercial contractual arrangements which differentiates them from commercial contracts under Australian law is that transactions are not always governed by the subject of the trade.¹⁶ Indeed Berndt claims that although most trade proceeds on a conventional assessment of the value of the goods exchanged, in some circumstances the goods are secondary to 'the partnership itself, as a social relationship, and the prestige which the partners derive from the exchange ... [or] the goods themselves are enhanced in value by virtue of the exchange or the associated ceremony'.¹⁷

These features of reciprocity and prestige (or social status) and the important obligations of kinship that underpin many of the contract-type arrangements in traditional Aboriginal society have led some to argue that Aboriginal people had no conception of contract prior to European contact.¹⁸ Adding to this perception is the communal nature of much exchange in traditional Aboriginal society. Although there can be no doubt that traditional Aboriginal society had some notion of

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8. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 133.
 9. Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 23.
 10. *Ibid.*
 11. Traditional Aboriginal society also had a concept of loan and credit. See Peterson N, 'Demand Sharing: Reciprocity and the Pressure for Generosity Among Foragers' (1993) 95 *American Anthropologist* 860, 867; Ellinghaus, suggests that Aboriginal society also had a concept of interest: Ellinghaus, *ibid* 24.
 12. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 122–29.
 13. Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 25.
 14. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 122.
 15. *Ibid* 134.
 16. See Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 238.
 17. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 133.
 18. Gava J, 'An Australian Contract Law? – A Reply' (1998) 12 *Journal of Contract Law* 242, 243.

personal property,¹⁹ many transactions concerned communal property²⁰ or were entered into by kinship or family groups rather than individuals. That discrete individual exchanges based purely on bargain was not the paradigm in traditional Aboriginal society is said by some to indicate that a conception of contract, at least as we know it in Australian law, did not exist.²¹

Certainly it must be noted that, although there are strong similarities with Australian contract law in some traditional Aboriginal transactions, it is unnecessary to impose that framework to determine whether an Aboriginal customary law of contract existed. To the extent that there were commercial transactions in traditional Aboriginal society, the primary question is whether the expectations associated with these exchanges derived from social norms or from customary law. This issue is complicated by the blending of social norms, religious norms and law in Aboriginal society. However, one distinctive feature of a law as opposed to a social or religious norm would appear to be its enforceability.²² Ellinghaus has noted that:

Institutionalised means were provided for the settlement of disputes arising from inequities of exchange or from the failure to discharge obligations, for example, the *kopara* or *kopari*, a meeting arranged by headmen between the disputants.²³

Ellinghaus emphasises the legal quality of these meetings.²⁴ Further evidence that a breach of obligation (even in the context of gift exchange) resulted in more than merely dashed expectations is provided in the following passage from Alfred Howitt:

A member of a local group setting out to visit neighbouring groups or tribes promises to bring back presents; a string is tied around his neck to remind him of his promise; someone remaining behind is appointed his *yutchin*. It is then his duty to bring back with him articles for his *yutchin*, who while he is away also collects presents for him. Under no circumstances is

such a pledge broken, for if a person failed in it he would have all the men in the camp at him.²⁵

The enforceability of obligations and sanctions consequent upon breach together with the elements of promise exchange, bargain and the sophisticated nature of rules governing transactions indicate that, in a very broad sense, a customary law of contract did exist in traditional Aboriginal society. The question for the Commission is whether there is a need for Australian law to functionally recognise Aboriginal customary laws in this area or whether indeed Australian law can be informed by Aboriginal customary law in this regard,²⁶ particularly in relation to the social and moral dimensions of contract.

Recognition of Aboriginal Customary Laws of Contract

In its 1986 report the ALRC found that 'Aboriginal customs of gift giving, the exchange of goods and services and the sale of personal property appear to fit within the normal legal rules'.²⁷ It also observed that '[f]ew conflicts appear to have arisen between Aboriginal customary laws and the general law' in this area.²⁸ The Commission's investigations indicate broad agreement with this observation; however, it is worth noting two apparent differences between Aboriginal and Australian law that may induce conflict.

First, agreements in traditional Aboriginal society were always verbal. There is evidence that many Aboriginal people still place great faith in oral agreements and that some do not understand why such agreements must be rendered in writing.²⁹ During the Commission's consultations in Geraldton it was said that verbal agreements are often made regarding inheritance and that these were rarely written down. Although agreements of this nature are not strictly contractual, it does suggest that verbal agreements may still be

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19. Although, as the ALRC noted, 'traditional Aboriginal societies were not materialistic' there were certain items such as tools, weapons, certain sacred objects and surplus food that were recognised as being individually owned. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [327]. It should be noted here that real property (that is, land) was inalienable.
 20. Communally owned property included ceremonial objects and the rights to perform a certain song or dance or the right to travel through and use certain resources on tribal lands. For example, Daisy Bates has noted that '[t]he Ooldea...lived and thrived on the renown of their water' and Frederick McCarthy recorded the trade in rights to mine red ochre resources: as cited in Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 23.
 21. Gava J, 'An Australian Contract Law? – A Reply' (1998) 12 *Journal of Contract Law* 242, 244.
 22. Hoebel EA, *The Law of Primitive Man* (New York: Atheneum, 1973) 26–27.
 23. Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 24.
 24. *Ibid.*
 25. Howitt AW, *The Native Tribes of South-East Australia* (1904) 712–14, as cited in Ellinghaus, *ibid* 23.
 26. Ellinghaus, for instance, has argued that Australian law should be informed by 'Aboriginal contract law' rather than by English precedent. See Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13.
 27. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [328].
 28. *Ibid.*
 29. Westcombe R, 'Bad Money Business' (1991) 2(50) *Aboriginal Law Bulletin* 6, 6.

common in other transactions. Such reliance on oral promises may place Aboriginal people at a disadvantage in a commercial world driven by written contracts.

Second, it has been noted above that Aboriginal agreements are traditionally infused with social and religious norms that inform the contractual relationship between the parties. Indeed it has been noted that the existence of these norms resulted in a 'low incidence of sharp practice or cheating in [traditional] Aboriginal exchange'.³⁰ However, in modern society these same norms can create expectations of relational integrity that do not necessarily inhere in a contract. Entering a contract under such social assumptions may make some Aboriginal people more vulnerable to sharp practice, especially when entering into contracts with people who are not kin or who have no understanding of Aboriginal custom.

Whilst Australian common law rules of contract recognise the existence and enforceability of oral contracts and have developed to provide substantial relief where unconscionable conduct has influenced a contract, there is arguably room for courts to recognise Aboriginal laws and customs in the application of these principles. Bob Hughes and Peter MacFarlane have argued (in the context of the customary laws of South Pacific peoples) that the common law should be expanded to allow for terms implied into contracts on the basis of a traditional custom shared by the parties to a contract.³¹ They also raise the possibility of use of traditional custom as a basis for the equitable remedy of estoppel by convention:

In cases where the parties have certain expectations arising from custom or tradition, estoppel by convention may provide a basis for defending subsequent proceedings or initiating legal action. Estoppel by convention does not require that any specific representation be made or that there be any misleading of the representee.³²

...

On this basis it is arguable that custom need not be regarded as a separate source of law but rather as a

part of the circumstances giving rise to the application of common law and equity.³³

Although these arguments are persuasive and may indeed foreshadow the future development of the common law if an appropriate case arose for decision,³⁴ the Commission is of the opinion that, in the absence of any evidence of current conflict between Aboriginal customary law and Australian law in this area, the potential for development of the common law to recognise customary rules of contract should remain a matter for the judiciary. The Commission does not believe that any statutory intervention is required to direct courts to have regard to customary law in this area.

Protecting Indigenous Consumers

In arriving at the conclusion that the statutory recognition of customary laws of contract is unnecessary, the Commission was influenced by the fact that the majority of contracts entered into by Indigenous Australians (and indeed all Australians) are consumer and credit contracts.³⁵ These contracts are generally governed by legislation aimed at protecting the consumer and disputes surrounding such contracts are often settled without judicial intervention. Western Australia's consumer protection regime would therefore appear to provide a more practical focus in efforts to reduce any disadvantage that Aboriginal people may experience as a result of the different expectations traditionally placed upon Aboriginal contractual relations.

In Western Australia consumer contracts are governed by a number of statutes including the:

- *Sale of Goods Act 1895* (WA);
- *Fair Trading Act 1987* (WA) (the FTA);
- *Trade Practices Act 1974* (Cth) (the TPA); and
- *Consumer Credit (Western Australia) Act 1996* (WA) (the *Consumer Credit Code*).

30. Sharp L, 'Ritual Life and Economics of the Yi-Yoront of Cape York Peninsula' (1934) 5 *Oceania* 19, 39, as cited in Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 26.

31. Hughes B & MacFarlane P, 'The Application of Custom in South Pacific Contract Law and as a Basis for an Estoppel' (2004) 20 *Journal of Contract Law* 1, 7–9.

32. *Ibid* 10.

33. *Ibid* 14.

34. The likelihood of such a case arising in relation to a dispute between two Indigenous individuals in Australia would be much less than in the South Pacific where traditional village life remains strong and where commercial transactions are more likely to be infused by shared understandings of customs.

35. Although it is noted that an increasing number of Aboriginal people (including many traditional Aboriginal people or people from remote communities) are entering contracts for the rights to use and produce original artworks. These artworks often feature communally owned stories or designs and issues have arisen as to the validity of such contracts. These matters are discussed further in relation to intellectual property below: see 'Indigenous Cultural and Intellectual Property Rights', pp 318–28.

These statutes (along with targeted legislation such as the *Door-to-Door Trading Act 1987* and the *Motor Vehicle Dealers Act 1973*) combine to provide substantial protection to Western Australian consumers and define the rights and responsibilities of consumers, suppliers, manufacturers and credit providers. For example, the FTA and the TPA provide comprehensive protection to consumers who have purchased (or have entered into a contract to purchase or acquire) goods or services as a result of misleading or deceptive conduct. These Acts also provide remedies to consumers who are unable to understand documents relating to the purchase or supply of goods or services (for example, where a person is illiterate or has limited English and where documents have not been adequately explained by the trader) or who have otherwise been subject to undue influence or pressure to enter a contract for the purchase of goods or services. Remedies also apply under the TPA and FTA in regard to false representations about warranties, the quality, state or need for goods or services or the availability of parts and repairs, and in respect of the sale of defective goods.³⁶

The *Consumer Credit Code* regulates the provision of credit or finance to consumers and includes such arrangements as personal loans, mortgages, credit cards and medium- to long-term leasing. It requires that credit providers must ensure that a consumer has understood and been provided with a copy of all information relevant to rights and obligations of all parties to the credit contract. The Code allows the re-opening of a contract and adjustment of contractual terms if it is found to be unjust.

Specific issues facing Indigenous consumers

In recent years there has been significant focus on Indigenous consumer issues by Australian governments. In particular there is concern about Indigenous financial literacy levels; vulnerability of, and discrimination against, Indigenous consumers; and questionable trading practices or rorts, many of which are specifically targeted to Indigenous consumers in remote

communities. For example, the Department of Consumer and Employment Protection (DOCEP) in Western Australia has recently warned of a door-to-door trader preying on Indigenous consumers selling educational kits for children and obtaining authority for indefinite direct bank debits.³⁷ The National Indigenous Consumer Action Plan provides further case studies of door-to-door traders convincing some Indigenous consumers to sign up for funeral plans and life insurance, again facilitated by direct debits from bank accounts over which the consumer often has little understanding or control.³⁸

Remote Indigenous consumers have been identified as being particularly vulnerable to unfair or predatory trading practices. In remote communities there is often very limited (if any) choice about where consumers can obtain goods and services; the quality of goods and services may be substandard or unregulated; the variety of goods available for purchase may be limited; and consumer access to banking and credit facilities and other financial services is often severely restricted. Concomitant to this lack of choice is lack of competition: a state of affairs that can lead to traders taking unfair advantage of consumers. The National Indigenous Consumer Strategy Working Party (NICSWP) has found that Indigenous people are often unaware of their rights as consumers or are unwilling to complain about poor treatment or faulty or substandard goods;³⁹ the difficulty of regulating unfair trading practices in remote communities simply compounds these problems.

NICSWP has recently published a national strategy to guide consumer protection agencies in addressing the problems that typically face Indigenous consumers.⁴⁰ Eight national priorities have been set including raising financial literacy levels amongst Indigenous people; improving Indigenous employment opportunities in consumer protection services; addressing discrimination in the housing market; and addressing exploitation in Aboriginal art industries. The plan also targets certain trading practices found in remote communities (such as the practice of 'book-up') which have a high record of abuse.

36. The *Sale of Goods Act 1897* (WA) also applies to protect consumers in certain circumstances.

37. DOCEP, *Call for Public Information from Indigenous Consumers* (Media Statement, 4 April 2005).

38. National Indigenous Consumer Strategy Working Party, *Taking Action, Gaining Trust: A National Indigenous Consumer Action Plan 2005–2010*, Consultation Document (undated) 9. See also Australian Securities and Investments Commission (ASIC), 'ASIC Acts to Stop Illegal Door-to-Door Selling to Indigenous Communities' (Media Statement, 1 April 2004).

39. *Ibid.* It is important to note that, unlike many Western societies, there is no established culture of complaint in Australian Aboriginal societies. The sense of shame attached to complaining is a significant obstacle in encouraging Aboriginal people to assert their consumer rights.

40. *Ibid.* DOCEP WA has become the lead agency, responsible for monitoring implementation of recommendations and national progress under the strategy.

Book-up

A feature of many stores⁴¹ servicing remote Aboriginal communities is the book-up system – a type of informal credit system which operates with or without attached fees or interest and allows consumers to buy goods now and pay for them later. Book-up can benefit consumers by helping them to manage their money between pay-days⁴² and by allowing cash withdrawals where there are no banking facilities or where a person might otherwise have no access

to credit. Most stores that offer a book-up facility require some form of security and in many cases a consumer's bank debit card or passbook will be retained. There are some benefits to a store retaining a consumer's card, in particular where there is no other safe place to keep the card or where a consumer is concerned that others might force disclosure of a PIN number and try to access the account.⁴³ There are also situations where a person with low financial literacy or an intellectual or physical disability needs the assistance of the store-owner to access his or her account to pay for goods.

There is, however, a disturbingly common practice of the retention by traders of PIN numbers with the cards of Indigenous consumers.⁴⁴ This practice not only poses a serious risk of fraud and increases the potential for exploitation of Indigenous consumers, but also gives traders primary control over their customers' accounts. The Commission has heard stories where trader access to accounts has resulted in the totality of a consumer's income being withdrawn fortnightly to settle part of a debt leaving the consumer with no access to funds



until the debt is fully paid. There have also been several cases of theft of cards and PIN numbers from stores or other traders. In circumstances where no local banking facilities exist, the theft or loss of cards can leave consumers without access to their accounts for some time. There is also the potential for consumer liability for any unauthorised transactions resulting from theft because of the previous disclosure of the consumer's PIN number. Another problem with stores retaining cards as security is that when a store is closed (including for lengthy periods over holidays) consumers have no access to their funds.⁴⁵

Apart from problems caused by the retention of PIN numbers with customer debit cards, book-up can also cause problems for Indigenous consumers when it is not managed well or where traders or others take advantage of the system.⁴⁶ Book-up can encourage over-buying, particularly where no credit limit is set by the trader.⁴⁷ This can lock people into a debt spiral and promote dependency on one particular store.⁴⁸ Other problematic trading conduct associated with the use of book-up in Aboriginal communities includes traders

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41. The range of stores or traders providing book-up in Western Australia includes community stores, petrol stations, fast-food outlets, regional airlines, taxi services, mechanics and pubs or hotels.
42. This allows some Indigenous families to manage the cycle of 'feast and famine': see Westbury N, *Feast, Famine and Fraud: Considerations in the delivery of banking and financial services to remote Indigenous communities*, Centre for Aboriginal Economic Policy Research, Discussion Paper 187 (1999).
43. Financial exploitation of elderly Aboriginal people is currently a matter of concern and the subject of a study on 'elder abuse' by the Office of the Public Advocate WA.
44. National Indigenous Consumer Strategy Working Party, *Taking Action, Gaining Trust: A National Indigenous Consumer Action Plan 2005–2010*, Consultation Document (undated) 12–13.
45. Renouf G, *Book Up: Some Consumer Problems*, ASIC (2002) 5.
46. See McDonald I, *Good Bookup, Bad Bookup* (Perth: Financial Counsellors' Resource Project WA, 2002).
47. Westcombe R, 'Bad Money Business' (1991) 2(50) *Aboriginal Law Bulletin* 6, 7. See also Renouf G, *Book Up: Some Consumer Problems*, ASIC (2002) 5–6.
48. *Ibid.*

charging higher prices for goods and services (even in circumstances where a book-up fee is also charged); allowing relatives to book-up on an individual's account without authorisation; and failing to provide accounts to customers, making it difficult to keep track of expenditure.

In response to these problems the Australian Securities and Investments Commission (in association with Australian consumer protection agencies) has created a book-up kit to be released later this year which is designed to assist traders in implementing responsible book-up practices and to support Indigenous consumers in identifying and addressing problems with book-up in their communities.⁴⁹ The kit offers consumer advice on such things as negotiating payment plans, registering complaints and taking action against traders, as well as setting out alternatives to book-up⁵⁰ and detailing successful financial management and book-up practices instituted in other communities. The Commission strongly supports this initiative; however, it is recognised that the success of this initiative (and of many aspects of the wider National Indigenous Consumer Strategy) will depend heavily on government commitment to outcomes and on the adequate resourcing of Indigenous staff positions attached to DOCEP regional offices.

The need for Indigenous consumer education

Although the current bundle of consumer protection legislation appears to be adequate to assist most Indigenous consumers when help is sought,⁵¹ studies have found that there is a need for operational change within consumer protection agencies to make consumer protection services more accessible to Indigenous Australians.⁵² An urgent need for education that is specifically targeted at Indigenous people to increase knowledge of their rights and responsibilities as consumers has also been identified.⁵³ DOCEP has sought to address the special needs of Indigenous consumers in Western Australia by the employment of Indigenous educators, who are currently working closely with regional offices and Indigenous advocates and Elders to create a framework for the appropriate delivery of consumer protection advice and services to Aboriginal communities.⁵⁴ As a result of this close engagement with Aboriginal communities DOCEP has identified further consumer issues (such as issues surrounding the sale of motor vehicles) that may require legislative change to enhance protection for Indigenous (and indeed all Western Australian) consumers. It is expected that a review of relevant legislation will be undertaken as part of DOCEP's implementation of the National Indigenous Consumer Strategy over the next five years.⁵⁵

49. Quiggin R & Renouf G, *Dealing with Book Up: A Guide* (Sydney: Australian Securities and Investments Commission, 2005).

50. Such as voucher systems, money-fax systems, community banks and credit unions, phone or internet banking transfers, and the Centrepay system provided by Centrelink.

51. See, Dee B, *Sharp Practices, Aboriginal Consumers and the Trade Practices Commission* (1991) 2(50) *Aboriginal Law Bulletin* 8, 9.

52. National Indigenous Consumer Strategy Working Party, *Taking Action, Gaining Trust: A National Indigenous Consumer Action Plan 2005–2010*, Consultation Document (undated) 5.

53. Renouf G, *Good Practice in Consumer Education for Indigenous People*, Consumer Protection Directorate, Australian Securities and Investments Commission (September 2002).

54. DOCEP (WA), *Indigenous Educators Help to Identify Needs* (Media Statement, 15 April 2004).

55. See, National Indigenous Consumer Strategy Working Party, *Taking Action, Gaining Trust: A National Indigenous Consumer Action Plan 2005–2010*, Consultation Document (undated).

Succession: Distribution of Property upon Death

Succession laws govern the distribution of property upon death and include laws relating to wills, intestacy (where a person dies without leaving a will), administration of the estates of deceased persons and family provision. In 1995 the Standing Committee of Attorneys-General established a national committee to examine and propose uniform succession laws which may ultimately be enacted in each Australian state and territory. The special position of Aboriginal people, particularly in relation to the distribution of property of an intestate deceased,¹ is being considered as part of the process of this national review of succession laws.² It must, however, be recognised that the implementation of national uniform succession laws may well be some time away (if indeed an agreement can be reached between governments). In the meantime there are important improvements that may be made to the various laws governing succession in Western Australia as they relate to Aboriginal people. The Commission's proposals for reform therefore focus on these areas whilst also taking into account the discussion and findings of those law reform agencies involved in the uniform succession laws project.

or gift such property were governed by certain rules. These rules or laws varied from tribe to tribe (or group to group); however, there are certain fundamental points about traditional property ownership that can broadly be made.

Firstly, as mentioned earlier, despite the apparent communalism of traditional Aboriginal society it is clear that Aboriginal people have always had a conception of personal (or privately owned) property. However, because traditional Aboriginal societies were not materialistic and were in most cases nomadic, the property that was privately owned by individuals was likely to have been confined to useful items such as spears, digging sticks and some other items of sacred value.³

Secondly, the range of things that could be personally owned in traditional Aboriginal society is restricted under Aboriginal customary law. For example, land, or real property, was inalienable and belonged communally to the tribe or clan.⁴ The same applied to resources in that a person could not individually own a patch of

Property Ownership

The traditional position

Before turning to a discussion of the traditional position of distribution of property upon death and the adequacy of Western Australian succession laws in relation to Aboriginal people, it is necessary first to examine the notion of property ownership at customary law. Like most areas of traditional life, the ownership of property and the right to trade, exchange, pass on, will



1. Provision for Aboriginal customary laws in the distribution of intestate estates is important because the majority of Aboriginal people in Australia die intestate. See Vines P, 'Wills as Shields and Spears: The failure of intestacy laws and the need for wills for customary law purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16.
2. The New South Wales Law Reform Commission (NSWLRC) has assumed responsibility for the final part of the uniform succession laws project on intestacy. An Issues Paper was published in April 2005 which makes special reference to the potential for recognition of Aboriginal customary laws in the proposed national scheme: NSWLRC, *Uniform Succession Laws: Intestacy*, Issues Paper No 26 (April 2005).
3. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [327]. The custom of demand sharing among Aboriginal people also made the amassing of personal possessions difficult. See Peterson N, 'Demand Sharing: Reciprocity and the pressure for generosity among foragers' (1993) 95 *American Anthropologist* 860, 867.
4. See Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 24.

fruiting trees, a water hole or a red ochre mine;⁵ although, resources taken from the natural world by virtue of hunting and gathering may be individually owned.⁶ Whilst sacred emblems, songs, designs and dances were generally communally owned, the rights to perform or use them may in some circumstances be traded or gifted to another Aboriginal group.⁷

Finally, there were some items that could only be personally owned temporarily. Berndt and Berndt explain that 'the goods used in gift exchange are personal property only for a certain period, after which the compelling influence of the trading relationship ensures that they are handed on'.⁸

The contemporary position

To the extent that Aboriginal society has, for the most part, accepted the cash economy and its rules⁹ it would seem that there would be greater opportunities for accumulation of material possessions and thus the sense of individual ownership would be more pervasive. However, communal ownership is still the dominant paradigm in Aboriginal society in relation to cultural and artistic property¹⁰ and to land the subject of claim under native title or other land rights legislation. In addition, Jill Byrnes has observed that the special obligations of kinship which place strong demands on Aboriginal people to share with kin 'makes the accumulation of wealth difficult (though not impossible) for an individual'.¹¹

Whilst these cultural values may impact in some instances on the amount or type of property owned, it is undeniable that most Aboriginal people now accept a greater degree of individual ownership of property (including land) than their ancestors. Indeed, the value of some Aboriginal estates may be substantial. The operation of succession laws (in particular, laws of

intestacy) are therefore of vital importance to ensuring that such property is passed on in culturally appropriate ways.

Customary Law Distribution of Property upon Death

The traditional position

Traditional methods of distribution of a deceased's property appear to differ widely across Western Australia and even within the same region. The Commission's consultations in Geraldton revealed that:

There are variations in practice depending on locality, from the coast eastwards. As always, coastal people differ from desert people. Some burn all possessions (a desert, Central Australian practice); coastal people don't do this. In other places Aboriginal people have their possessions buried with them – an example was given of a case where a man had his car buried with him. In some places it is traditional practice to give [a deceased's property] to outsiders and let them take it away.¹²

Methods of traditional distribution or disposal of property upon death communicated to the Commission during its consultations were:

- **Determination of property distribution by immediate kin:** This was said to be the traditional position of Aboriginal groups in Cosmo Newbery and Albany.¹³ In the Pilbara region the traditional position was more specific: the practice there is for the blood families to give the material goods of the deceased away, while the children inherit the traditional songs and dances.¹⁴
- **Determination of property distribution by tribal Elders:** This was reportedly the traditional position

5. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra, Aboriginal Studies Press, 5th ed., 1999) 134.

6. Although the individual ownership of food may be conditioned by the claims of other individuals: see Piddington R, *An Introduction to Social Anthropology* (Edinburgh: Oliver & Boyd, vol 1, 1950) 289. But cf Peterson who claims that although the hunter has the right to distribute the food acquired, the food is still collectively owned: Peterson N, 'Demand Sharing: Reciprocity and the pressure for generosity among foragers' (1993) 95 *American Anthropologist* 860, 866.

7. Ellinghaus MP, 'An Australian Contract Law?' (1989) 2 *Journal of Contract Law* 13, 23.

8. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra, Aboriginal Studies Press, 5th ed., 1999) 134.

9. ALRC, 'Aboriginal Customary Law – Marriage, Children and the Distribution of Property,' Discussion Paper No 18 1982, [28].

10. The fact that issues of collective ownership frequently arise in cases concerning copyright in Aboriginal design attests to the continuing importance of communal ownership in Aboriginal society. See McLennan AM, 'A Struggle Between Owners? What is the Legal Status of an Interest in Cultural Property?' (1998) 15(4) *Environmental and Planning Law Journal* 241, 244.

11. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 10. Elkin has also reported the difficulty of making 'headway' because they must 'share their home and possessions with visitors [kin]': See Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 238.

12. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18.

13. LRCWA, Project No 94, *Thematic Summaries of Consultations – Cosmo-Newbery*, 6 March 2003, 21; *Albany*, 18 November 2003, 21.

14. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 19.

of Aboriginal people in Wuggubun in the far north-east of Western Australia.¹⁵

- **Destruction of the deceased's personal property:** According to Aboriginal people in Kalgoorlie, the traditional approach to the disposition of personal property on death is to destroy it.¹⁶ This practice is also common in other parts of Australia. Elkin has noted of some central Australian tribes that 'everything that was associated with [the deceased] is destroyed, avoided or purified. His camp and grave are deserted; his belongings destroyed or broken'.¹⁷ In Wiluna, it was reported that in some local groups the custom was to burn the belongings and house or camp of the deceased.¹⁸ The people in Geraldton also observed this as being a practice of some Western Australian desert peoples.¹⁹
- **Distribution of some of the deceased's property to distant groups:** Some Aboriginal people who attended the consultations in Wiluna reported that they would send some property of a deceased away to distant groups. It appeared that this might be a contemporary adjustment to the traditional law (which otherwise appeared to demand that property of a deceased be burned or destroyed) to take account of valuable property such as motor vehicles.²⁰ Tonkinson has also observed this practice in respect of the Mardu people,²¹ but only in relation to sacred belongings which 'are passed on to members of distant groups as part of the gift exchanges that occur during big meetings'.²² According to Tonkinson, the Mardu people usually burn all other personal belongings of the deceased.²³
- **Parents designate a child to inherit property:** According to the Aboriginal people in Mirrabooka, both parents give inheritance rights to a designated child, which may be the eldest depending on the local custom.²⁴

The contemporary position

The examples listed above indicate the wide diversity of traditional Aboriginal methods of distribution of property upon death in Western Australia. In some cases it was clear to the Commission that these methods (or a modified version of them) were still practised. However, during the Commission's consultations in Geraldton it was acknowledged that 'things had changed from the old days when issues focused on spiritual rather than material things and all a man could give was what was in his heart'.²⁵ Aboriginal people there stressed the need to 'catch up, make a will [especially] if you have a car and a house'.²⁶ It was also reported that verbal agreements were often made about inheritance; however, conflicts were reported where the deceased's intentions were not written down and where customary law required a system of distribution that did not satisfy immediate kin.²⁷

The Aboriginal community in Bunbury reported that they tended 'to follow "white" practices around inheritance' but that the failure of some old people to make wills had caused conflict between kin.²⁸ In Broome it was said:

[T]raditional law does not provide clear guidance on the distribution of property on death. Where there is a will, this is respected. But otherwise, there can be problems ... our people do not understand why, when there is no will and the deceased left no family, the property goes to the government rather than to the community.²⁹

It is discernible from these statements that, at least in some places, there is the potential for confusion about the appropriate customs that attach to the distribution of property upon death. There is also evidence that some Aboriginal people prefer the certainty and testamentary freedom of a will or recorded instructions for distribution of their property, even if this might result

15. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 39.

16. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 28.

17. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 342–43. See also Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 457.

18. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.

19. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18.

20. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.

21. The Mardudjara territories surround Lake Disappointment on the western side of the Gibson Desert, east of Jigalong and the Canning Stock Route (Well No 15).

22. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart & Winston, 1978) 84–85.

23. *Ibid.*

24. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 13.

25. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18.

26. *Ibid.*

27. *Ibid.*

28. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 9.

29. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 26.

in a distribution that is contrary to the relevant customary law of their people.

Succession Laws in Western Australia

In Western Australian law the paradigm of testamentary freedom dominates allowing a person to deal with their property as they please. However, a person's intentions can only be strictly assured if that person has made a valid will (which remains unrevoked)³⁰ directing the distribution of his or her property upon death. In circumstances where a non-Aboriginal person dies intestate (that is, without having left a valid will) Part II of the *Administration Act 1903* (WA) provides for the order of distribution of the deceased's property; however, a separate statutory distribution regime applies to the intestate deceased estates of most³¹ Aboriginal people in Western Australia.

Aboriginal Intestacy: The Western Australian Statutory Scheme

The rules relating to the distribution of property of an intestate Aboriginal person are found in the *Aboriginal Affairs Planning Authority Act 1972* (WA) (the AAPA Act) and its accompanying regulations (the AAPA Regulations). The legislative provisions apply only to persons of Aboriginal descent, which is defined in s 33 of the Act as 'of the full blood descended from the original inhabitants of Australia or more than one-fourth of the full blood'. In the event that the qualifying deceased left a will, the estate will be distributed according to the terms of that will;³² however, where there is no will (or the will is invalid) distribution of the estate is administered under the statutory scheme in the following way:

- (1) Upon the death of an intestate Aboriginal (who meets the qualification requirements of s 33 of the AAPA Act) the property of the deceased is vested in the Public Trustee who undertakes the

administration of the estate and distribution of the property to persons entitled under the intestacy provisions of the *Administration Act*.

- (2) If no persons entitled under the *Administration Act* can be ascertained and the deceased was not married pursuant to the *Marriage Act 1961* (Cth),³³ the estate is distributed to those persons entitled under the AAPA Regulations. These regulations purport to 'so far as that is practicable, provide for the distribution of the estate in accordance with the Aboriginal customary law as it applied to the deceased at the time of his death'.³⁴ Pursuant to reg 9 the measure of entitlement to, and order of distribution of, an intestate Aboriginal estate is:
 - Where the deceased was male his customary law wife or wives³⁵ but only if there was a child or children of the union/s. *Equal shares*.
 - Where the deceased was female, her customary law husband, regardless of whether they had children. *Whole estate*.
 - The children of a traditional marriage. *Equal shares*.
 - The deceased's father 'by reason of tribal marriage'. *Whole estate*.
 - The deceased's mother 'by reason of tribal marriage'. *Whole estate*.
- (3) If no valid claim is made on the estate within two years of the intestate's death and no person entitled under the AAPA Regulations can be ascertained, provision is made for the estate to be beneficially invested to a person or persons who have a 'moral claim' over the estate. Such claims must be made by application supported by evidence to the Public Trustee and may only be approved by the Governor.³⁶
- (4) If there is no approved moral claim on the estate, the estate will be vested in the Aboriginal Affairs Planning Authority (AAPA) to be held in trust for the benefit of 'persons of Aboriginal descent'.³⁷

30. In Western Australia a marriage will automatically revoke a will; although a divorce will not. The Commission has previously made recommendations to reform the law in this area; however, currently these reforms remain unimplemented. See LRCWA, *Effect of Marriage and Divorce on Wills*, Project No 76(11) (1991).

31. Where a deceased Aboriginal person has been married pursuant to the *Marriage Act 1961* (Cth) the general regime under the *Administration Act* applies. Further, a person must qualify by definition of descent under the *Aboriginal Affairs Planning Authority Act 1972* (WA). Problems with the current qualifying provision are discussed below.

32. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 34.

33. *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) r 9(1)(b).

34. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 32.

35. Traditional polygamous marriages are therefore recognised under this regulation.

36. *Aboriginal Affairs Planning Authority Act 1972* (WA) s 35(3).

37. *Ibid*.

There is scope for a vast number of Aboriginal intestate estates to escape the notice of authorities and to be dealt with by kin or community . . . under customary law.

Practical operation of the Western Australian scheme

Before turning to consider the various criticisms of the Western Australian Aboriginal intestacy scheme it is important to note that the legislation is not automatically invoked upon the death of an intestate Aboriginal person. The Public Trustee must first become aware of the death before the property of the deceased will vest in that authority for distribution under the scheme. The Public Trustee generally becomes aware of intestate Aboriginal estates in various ways including: notification by superannuation bodies; notification by the Supreme Court where an application has been made for formal letters of administration (but only where it is clear on the face of the documents that the deceased is of Aboriginal descent); notification by kin who wish the Public Trustee to administer the estate; and where the Public Trustee has been administering the deceased's financial affairs throughout his or her lifetime under formal administration arrangements.

There is scope, therefore, for a vast number of Aboriginal intestate estates to escape the notice of authorities and to be dealt with by kin or community as they see fit, including under customary law. This is likely to be the case where the deceased did not individually own any real property (that is, land or residential property) or have significant material assets.³⁸ In other cases the costs of administration may be such that they would significantly diminish the size of the estate, perhaps rendering it worthless. In these cases legislative requirements for the formal administration of estates might be ignored by family.

Under s 139 of the *Administration Act* a bank or other authorised deposit-taking institution may release up to

\$6,000³⁹ to 'any person who appears to the satisfaction of the manager of the [bank] to be the widower, widow, parent or child' or de facto partner of the deceased person, without the requirement of formal letters of administration or a grant of probate. Although this provision was not made specifically in contemplation of the distribution of small estates,⁴⁰ it can have that effect in practice. Further, it appears that, in practice, the amount authorised for release by proclamation is regularly exceeded by banking institutions such that, in many cases, a significant cash holding of an intestate Aboriginal deceased might be released to the deceased's family without invoking the formal distribution scheme.⁴¹

Criticisms of the current statutory scheme for distribution of property of an Aboriginal intestate deceased

Although the AAPA scheme was established to specifically cater for Aboriginal people and recognise their customary laws in the distribution of their estates, the operation of the scheme and its cultural appropriateness has been subject to substantial criticism. For the purposes of discussion it is helpful to group criticisms under categories.

Qualification for the AAPA scheme

The requirement in s 33 of the AAPA Act which limits application of the scheme to Aboriginal people of at least 'one-fourth of the full blood' has proven very difficult to apply in practice by the Public Trustee.⁴² As Prue Vines has pointed out, this provision produces the anomaly that a deceased person who has lived within and identified with a particular Aboriginal community, but who is less than one-fourth Aboriginal

38. In some cases property will be owned in joint tenancy with a spouse and money may be invested jointly allowing the spouse to access funds without the necessity of formal administration.

39. As proclaimed in the *Western Australian Government Gazette*, 100 of 1983, 5015.

40. Rather it pertains to the payment or reimbursement of funeral expenses and any 'such other purposes as may be declared and authorised by proclamation from time to time': *Administration Act 1903* (WA) s 139(1).

41. According to anecdotal information provided by the Public Trustee's Client Services Centre, at least one Western Australian bank will release up to \$50,000 under s 139 of the *Administration Act* whilst another two will release up to \$20,000. In its commentary on s 139 the Butterworths *Wills, Probate and Administration Service Western Australia* suggests that 'most banks will pay out up to \$15,000'.

42. Public Trustee (WA), Submissions on the Aboriginal Customary Laws Reference (8 December 2004) 1.

blood, will have his or her property distributed according to the *Administration Act* rather than the AAPA Act.⁴³ Currently the *Administration Act* does not recognise traditional customary law marriages (although these may well be 'picked up' by virtue of the de facto provisions in s 15 of the Act) and places emphasis on lineal blood relationships rather than classificatory kin relationships. In 1995, the Aboriginal Legal Service of Western Australia suggested that the definition of 'Aboriginal' in s 33 may also be contrary to s 10 of the *Racial Discrimination Act 1975* (Cth).⁴⁴ Moreover, in its employment of antiquated 'protection era' terminology, it has been noted that s 33 is likely to cause offence to Aboriginal people.⁴⁵

Application of the Administration Act

The first step of ascertaining those entitled to an intestate Aboriginal estate of a qualifying Aboriginal deceased is determination of entitlement under the *Administration Act* (step 1 above). In submissions to the Commission on this matter, the Public Trustee reported the following special difficulties faced by Aboriginal people when proving their entitlements under the *Administration Act*.

- Many Aboriginal people born before 1970 do not have their births registered and therefore may be unable to satisfactorily prove their entitlement to an intestate estate.
- Difficulties can arise in relation to kin names. For example, a person considered and called 'mother' in Aboriginal society might not be understood as a deceased's 'mother' under the *Administration Act*; although it is noted that Aboriginal people in a kin (non-biological) relationship of 'mother' to a deceased may qualify for entitlement under the *Administration Act* as an aunt in certain circumstances.⁴⁶
- Many Aboriginal families were broken up as a result of the policies of the stolen generation. This creates problems with proving entitlement. In many cases it is necessary for the Public Trustee to hire a

genealogist to prove a claim. This process is lengthy and expensive and may substantially diminish the estate. In some cases an estate will be worth too little to enable genealogical enquiries to be made.⁴⁷

Additionally, entitlement under the *Administration Act* is primarily blood or marriage related (although a de facto partner may qualify upon meeting certain conditions). The emphasis therefore is on lineal relationships (reflecting a non-Aboriginal notion of kinship) rather than collateral or classificatory relationships.⁴⁸ Nonetheless, it appears that most claims to entitlement in respect of intestate Aboriginal estates are proved under the general intestacy provisions of the *Administration Act*. There is also facility for the execution of a deed of family arrangement where those entitled to succeed to the estate agree that another person also has a right to claim against an estate, whether by virtue of customary law, a particular kinship relationship or otherwise.

Application of the AAPA Regulations

As set out in step 2 above, the AAPA Regulations apply to a qualifying Aboriginal deceased, not legally married, where no persons entitled under the provisions of the *Administration Act* can be ascertained. Although the AAPA Act states in s 35(2) that the regulations provide for the distribution of an intestate Aboriginal estate in accordance with Aboriginal customary law, the extent of customary law recognised under the regulations has been noted by one commentator to be 'absolutely minimal'.⁴⁹ Vines notes that the kinship structure implied by the entitlement list in reg 9 'is even more linear and shorter than the one used for non-Aboriginal people. There is no room for collateral relatives'.⁵⁰ The extent to which the regulations actually reflect Aboriginal customary law has also been questioned by the Public Trustee.⁵¹

The Public Trustee has made the following comment in regard to the application of the AAPA Regulations:

Until [early 2004], the Director-General of the Department of Community Development could (in

43. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 112.

44. Aboriginal Legal Service (WA), *Submission to the Western Australian Government on Changes Needed to the Laws Dealing with Intestate Estates of Aboriginal Persons* (15 September 1995), as cited in Vines, *ibid* 114.

45. Public Trustee (WA), *Submissions on the Aboriginal Customary Laws Reference* (8 December 2004) 1.

46. *Administration Act 1903* (WA) s 14.

47. Public Trustee (WA), *Submissions on the Aboriginal Customary Laws Reference* (8 December 2004) 1–2.

48. Vines P, 'When Cultures Clash: Aborigines and Inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 104–105.

49. *Ibid* 112–13.

50. *Ibid* 113.

51. Public Trustee (WA), *Submissions on the Aboriginal Customary Laws Reference* (8 December 2004) 3.

Of primary concern is the fact that [s 35(1) of the AAPA Act] denies Aboriginal people the right to administer the estates of deceased family members.

theory) issue a certificate, which would be conclusive evidence of who is entitled to succeed under the Regulations, or that there are no persons so entitled ... The Director-General has not, however, issued any such certificates for many years. Section 35(4) was repealed ... to reflect this.⁵²

Without this certificate and because, to a certain extent, the AAPA Regulations overlap with the provisions of the *Administration Act* it would appear that 'it is rare for a person's entitlement to be proved' under the Regulations.⁵³ This calls into question the usefulness of the Regulations. In fact, it appears that in most cases where entitlement cannot be proved under the *Administration Act* a claim will progress by necessity to the moral claim stage (step 3 above) because of the difficulty of proving a relationship of entitlement under reg 9. Further, it is noted that the provisions of reg 9 discriminate between males and females such that a customary law wife will only have a valid claim on the estate if she has borne a child or children of the deceased. For these reasons the Public Trustee has suggested that the Regulations be 'either substantially changed or abolished altogether'.⁵⁴

Moral claims under the AAPA Act

As described in step 3 above, there is provision under the AAPA Act for a person to make a 'moral claim' to entitlement in relation to the distribution of an intestate deceased Aboriginal estate. A moral claim is made upon application to the Public Trustee pursuant to s 35 of the AAPA Act. A moral claim may be made by a person who has, for instance, had primary care for the deceased throughout his or her life or, perhaps, by someone who is in a special classificatory relationship with the deceased. The evidence required to prove a moral claim will differ from case to case; however, the Commission has been advised that such claims are 'regularly made and approved'.⁵⁵

The procedure relating to applications for moral claims to an intestate Aboriginal estate under s 35(3) of the AAPA Act are found in reg 9 sub-regs (5) and (6) of the AAPA Regulations. Under those regulations an application must be made to the Public Trustee who is required to cause the claim to be investigated and report in writing to the Minister of Indigenous Affairs. The Minister then makes a recommendation to the Governor in respect of the order that should be made in relation to the moral claim.

In its submissions to the Commission the Public Trustee urged that the moral claims provision should be retained '[o]therwise, a significant number of Aborigines will miss out on inheriting the proceeds of the estates of family members'.⁵⁶ The Trustee did, however, question the need for such claims to be approved by the Governor and suggested that these claims might be better determined by the State Administrative Tribunal.⁵⁷ Whilst the Commission understands the motivation behind this suggestion it notes that, in the usual course of things, a determination made by the Tribunal would incur an up-front filing fee and perhaps associated fees for orders. As it appears that the system is currently working reasonably well in relation to moral claims the Commission sees no reason to change the jurisdiction of determination of claims from the executive to the judicial arm of government.

Persons entitled to administer intestate Aboriginal estates

Currently s 35(1) of the AAPA Act requires that the Public Trustee administer all qualifying intestate Aboriginal estates. This requirement creates a number of concerns. Of primary concern is the fact that this provision denies Aboriginal people the right to administer the estates of deceased family members; although it has never been challenged, s 35(1) appears to be

52. Ibid 2. The Commission notes that s 35(4) of the AAPA Act (which relates to the certification of entitlement under the AAPA Regulations) has been repealed by the *Community and Children's Services Act 2004* (WA), although the relevant section of the repealing Act has not yet been proclaimed.

53. Ibid.

54. Ibid 3.

55. Ibid.

56. Ibid.

57. Ibid.

discriminatory and may be in breach of the *Racial Discrimination Act*.

The requirement that the Public Trustee administer all qualifying intestate Aboriginal estates also means that the estate is reduced by the administration fee (currently 4.4% of the value of the estate if it is between \$2,000 and \$200,000).⁵⁸ Although the fee charged in regard to most Aboriginal estates is quite low, without the requirement of s 35(1) family members might be able to administer an estate without incurring these fees.

Of course the repeal of s 35(1) may create further problems without concomitant amendment to the persons entitled to apply to administer an intestate estate under s 25 of the *Administration Act*. The Public Trustee has made the following comments in this regard:

Section 25 of the *Administration Act 1903* gives, amongst others, persons entitled in distribution to the estate of the deceased the right to apply for letters of administration. The *Public Trustee Act 1941* gives the Public Trustee the right to apply.

Before granting letters of administration, the Supreme Court generally want to know who are entitled in distribution to the estate of the deceased, and whether they want to apply for a grant themselves. The problem with Aboriginal estates is that, for the reasons outlined [see 'Application of the *Administration Act*' above], it is not always easy to work out who are entitled. Consequently, the Supreme Court could have some difficulties in granting letters of administration in respect of these estates.⁵⁹

The Public Trustee has suggested that the *Administration Act* could be amended to provide that, in relation to the granting of administration in respect of Aboriginal estates, 'the Supreme Court need not know who is entitled in distribution to them, nor whether they want to apply for a grant themselves'.⁶⁰

Cultural awareness in the administration of intestate Aboriginal estates by the Public Trustee

During the Commission's consultations with Aboriginal communities in Geraldton it was claimed that the Public Trustee's office 'don't understand Aboriginal traditions of inheritance' and that they 'need more cultural training'.⁶¹ The Commission understands the concerns of Aboriginal people in this regard but notes that the Public Trustee is severely limited by the current statutory distribution scheme in the way it can deal with Aboriginal intestate estates. The Commission also notes the Public Trustee's commitment to cultural awareness training of its staff⁶² and accepts that the Public Trustee is aware of many of the issues that impact upon Aboriginal people under the current regime.⁶³ However, the Commission also acknowledges that any changes to the current regime to recognise the kinship structures of different Aboriginal peoples may require more localised Indigenous input into cultural awareness training. In this regard, the Commission notes that, if its proposal for the establishment of Community Justice Groups (detailed in Part V of this Discussion Paper) is implemented, then these may provide a useful source of local cultural knowledge for agencies such as the Public Trustee.

Statutory Schemes for Administration of Intestate Aboriginal Estates in Other Jurisdictions

Western Australia is one of three Australian jurisdictions to provide specifically for the administration of intestate Aboriginal estates. The schemes in place in Queensland and the Northern Territory are relevant to the discussion of distribution of an intestate Aboriginal estate.

58. The fee reduces on a sliding scale for estates valued at over \$200,000. A reduced fee is also applied to the value of residential property in certain circumstances.

59. Public Trustee (WA), Submissions on the Aboriginal Customary Laws Reference (8 December 2004) 3.

60. Ibid 4.

61. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18. Matters regarding the cultural awareness of the Office of the Public Trustee in relation to administration of trusts and financial affairs of Aboriginal people are discussed under the heading 'Guardianship and Administration', below pp 296–99.

62. Detail of cultural awareness training undertaken by staff in the Office of the Public Trustee can be found in its *Annual Report 2003/2004*. However, the Commission notes that there is no indication whether the cultural awareness training provided to Public Trustee employees is delivered by Indigenous consultants.

63. So much is clear from the extensive submissions provided by the Office of the Public Trustee seeking to improve intestacy procedures for Aboriginal people.

Queensland

The statutory scheme operating in Queensland provides that if an Aboriginal person or Torres Strait Islander dies intestate and it proves 'impracticable to ascertain the person or persons entitled in law [that is, under the general law provisions] to succeed to the estate' the chief executive of the Aboriginal and Islander Affairs Corporation may determine the person or persons entitled to succession.⁶⁴ The New South Wales Law Reform Commission (NSWLRC) has noted that the distribution of the estate in these circumstances 'is entirely at the chief executive's discretion and, although he or she may have reference to Indigenous customary law, the distribution is not required to accord with customary practices'.⁶⁵ In the event that no persons entitled to the estate can be ascertained, the value of the estate vests in the chief executive who may apply the money at his or her discretion for the benefit of Indigenous people generally.⁶⁶

Northern Territory

As with the Western Australian and Queensland schemes, distribution of an intestate Aboriginal estate in the Northern Territory follows the general rules of intestacy found in Division 4 and Schedule 6 of the *Administration and Probate Act 1979* (NT). These provisions allow for distribution of an intestate estate following general rules modelled on Western lineal relationships. However, s 6(4) of the Act recognises Aboriginal traditional marriages as a marriage for the purposes of Act and s 67A provides for multiple spouses of an Aboriginal intestate deceased.

Under Division 4A of the *Administration and Probate Act* a person who claims entitlement at customary law to an intestate Aboriginal estate (or the Public Trustee) may apply to the Supreme Court for an order for distribution. An application under this Division must be accompanied by a 'plan of distribution' of the estate 'prepared in accordance with the traditions of the community or group to which the intestate Aboriginal belonged'.⁶⁷ The time limit imposed for making an application is six months; although this may be extended

by the court 'after hearing such of the persons affected as the court thinks necessary'.⁶⁸ The court may then make an order for distribution; however, in doing so, the court must take into account the plan of distribution prepared and the traditions of the community to which the intestate Aboriginal belonged.⁶⁹ An order for distribution under Division 4A may not be made by the Court where the making of an order would 'affect or disturb a distribution that was a proper distribution made for the purposes of providing for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate Aboriginal immediately before his death'.⁷⁰

Vines has suggested that the Northern Territory scheme 'for dealing with customary law in inheritance is the best of the models on offer'.⁷¹ This opinion appears to be shared by the NSWLRC who have invited submissions on the appropriateness of the Northern Territory model for national application in their recent intestacy issues paper.⁷² In considering its proposals for reform in relation to intestate Aboriginal estates in Western Australia, the Commission has therefore reviewed the advantages and disadvantages of the Northern Territory scheme and assessed the potential of its application in this state.

Advantages of the Northern Territory scheme

The Commission recognises that there are advantages to the legislative scheme in force in the Northern Territory. For example, a major benefit of the Northern Territory scheme is its ability to accommodate the diversity of customary laws on succession. Another is that the administration of an intestate Aboriginal estate is not, as in the current Western Australian scheme, automatically vested in the Public Trustee. This allows Aboriginal people the right to choose how to manage the administration of the estate of their intestate family member.

A further, and significant, advantage of the Northern Territory scheme is that it specifically recognises traditional marriages for the distribution of intestate

64. *Community Services (Aborigines) Act 1984* (Qld) s 173(1).

65. NSWLRC, *Uniform Succession Laws: Intestacy*, Issues Paper No 26 (April 2005) 128.

66. *Community Services (Aborigines) Act 1984* (Qld) ss 169, 173(4).

67. *Administration and Probate Act 1979* (NT) s 71B(2).

68. *Ibid* ss 71C(1) & (2).

69. *Ibid* s 71E.

70. *Ibid* s 71F(2).

71. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 116.

72. NSWLRC, *Uniform Succession Laws: Intestacy*, Issues Paper No 26 (April 2005) 131.

estates. In contrast, traditional marriage is only recognised in the Western Australian scheme when no entitled person can be ascertained under the intestacy provisions of the *Administration Act*. Although traditional marriages may (and in practice do) qualify for entitlement as de facto relationships under the *Administration Act* the Commission agrees with the ALRC's observation that

to treat a traditional marriage as merely a de facto relationship is to treat it as not a marriage. This is not a recognition of Aboriginal customary law.⁷³



For present purposes it should be noted that the Commission is of the opinion that Aboriginal traditional marriages should be accorded functional recognition in Western Australian legislation. A more detailed discussion of this point and accompanying proposals may be found in Part VII of this Discussion Paper dealing with Customary Law and the Family.⁷⁴

Disadvantages of the Northern Territory scheme

The Commission has identified a number of disadvantages to the operation of the Northern Territory scheme. Firstly, the scheme only applies to an intestate deceased Aboriginal who is not legally married under the *Marriage Act 1961* (Cth).⁷⁵ The consequence of this is that persons wishing to apply for customary law distribution of an intestate estate of a legally married Aboriginal will be precluded from so doing.

Secondly, the time allowed for an application of entitlement to be made to the court is quite short (six months) and may not facilitate the sometimes extensive mourning (or 'sorry-time') periods observed under customary law. Although this time may be extended upon application, it can only be done so in a hearing before the Supreme Court. The requirement of hearings before the Supreme Court in order to determine both extensions and applications for entitlement is potentially a costly exercise, particularly in cases of conflict. It may be that where an application is brought by the Public

Trustee there is capacity for costs to be drawn from the estate,⁷⁶ but where an application is brought by individuals up-front costs and fees may be payable. This may represent a significant barrier to making applications for customary law distribution under the scheme.

Thirdly, the requirement that applicants prepare a distribution plan reflecting the customary laws of the deceased's community will also likely incur costs.⁷⁷ The drawing up of distribution plans may also present significant practical difficulties in application in Western Australia. For example, it was noted earlier that members of an Aboriginal community in Broome reported that their traditional law did not provide clear guidance on the distribution of property on death and that conflicts have resulted where the deceased has not left a will. The consultations of the Commission also uncovered customs that require a deceased's property to be destroyed, burned or given away to distant tribes under customary law. It is not clear to what extent these traditional practices are observed today; however, there is clearly scope for such traditions to be ignored or altered in distribution plans, particularly where the value of an estate is great. A situation might also arise where the customary law distribution plans of several applicants applying for entitlement to distribution of the same estate vary to significant degrees.

Fourthly, it appears that since its enactment in 1979, the customary law distribution provisions provided for

73. ALRC, *Aboriginal Customary Law – Marriage, Children and the Distribution of Property*, Discussion Paper No 18 (1982) [11].

74. See below pp 291–92, Proposal 52.

75. *Administration and Probate Act 1979* (NT) s 71.

76. Naturally this will diminish the value of the estate.

77. Although it is possible that in some cases the costs of retaining the necessary anthropological and legal expertise may be covered by the Aboriginal Legal Service or by an Aboriginal land council and in cases of no conflict the evidence of elders or other persons may overcome the need for anthropological evidence.

in the Northern Territory scheme have rarely been used. Indeed, the Commission has been able to locate only one occasion of application of Division 4A.⁷⁸ This fact may well be a reflection of the disadvantages of the scheme identified above. In any event, the very limited use of provision for traditional distribution under Division 4A would appear to indicate that the application of the general intestacy provisions contained in Division 4 of the Northern Territory's *Administration and Probate Act* (which provide for traditional Aboriginal marriages) sufficiently recognise customary distribution of property.

Finally, it should be noted that the relationship between Division 4 (Distribution on Intestacy) and Division 4A (Intestate Aboriginals) in the *Administration and Probate Act* is unclear. The application of a customary law distribution plan under Division 4A has never been tested in a case where a 'next of kin' of an intestate Aboriginal deceased existed under the general entitlement provisions in Division 4. How competing claims under the general entitlement provisions and customary law provisions might be resolved (that is, which claim might take precedence and in what circumstances) is therefore a matter of conjecture.

The Commission's Preliminary Proposals in Relation to Distribution of Intestate Aboriginal Estates

Whilst the Commission does not propose adoption of the Northern Territory model for intestate distribution in Western Australia, it does acknowledge that there are legitimate reasons for substantial amendment to the current Western Australian scheme. The proposals outlined below seek to address the criticisms of the scheme identified earlier and import positive aspects of schemes operating in other jurisdictions.

Before setting out the Commission's proposals in this area it is important to remember that the application of the current AAPA scheme is limited in practice by the need for intestate Aboriginal estates to be brought to the notice of authorities. In most cases there is

capacity for kin to apply customary law to the distribution of a deceased's personal property without legislative or government interference. There is also scope under the *Administration Act* for kin to claim cash held in financial institutions without formal letters of administration. While distribution of real property and stocks or shares will generally require formal administration, it is acknowledged that such things were never a part of customary law (land, for example, was inalienable under traditional law) and would therefore not likely create conflict between customary law and the general law.

The Commission also notes the claims of some commentators that Aboriginal people are not so much concerned about inheritance of commodities but are deeply concerned about the inheritance of intellectual property, kinship obligations, sacred objects and cultural custodianship.⁷⁹ Such sentiments were confirmed by some Aboriginal communities during the Commission's consultations.⁸⁰ The Commission recognises that such things should not be governed by the laws of Western Australia and that customary law alone will determine succession in these matters. The proposals below are therefore confined to the distribution of personal and real property in the estate of an Aboriginal person who dies intestate and for which letters of administration are sought.

Proposal 52

That the present definition of 'person of Aboriginal descent' contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be deleted.⁸¹

That the requirement in s 35(1) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) that all property of an intestate Aboriginal deceased be automatically vested in the Public Trustee be removed so that the family or next of kin of such deceased may have the choice to administer the estate of the deceased by grant of formal letters of administration under the *Administration Act 1903* (WA).

78. *Application by the Public Trustee for the Northern Territory* [2000] NTSC 52. That Division 4A has only been used on one occasion was confirmed by the Northern Territory Supreme Court Registry. It is also noted that the use of the customary law distribution regime in this case was at the instigation of the Public Trustee, not the Aboriginal beneficiaries.

79. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 101–103.

80. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 19; *Bunbury*, 28–29 October 2003, 10.

81. In Part III above the Commission has proposed a new definition of 'Aboriginal person' to be inserted into the *Interpretation Act 1984* (Cth). This new definition will overcome problems of application and offensiveness of blood-quantum definitions such as that presently contained in s 33 of the *Aboriginal Affairs Planning Authority Act 1972* (WA). See Proposal 3, above p 49.

That s 25 of the *Administration Act 1903* (WA) be amended to state that in the case of intestate Aboriginal estates, the Supreme Court need not know who is entitled in distribution to them, nor whether they wish to apply for a grant of letters of administration themselves.⁸²

That traditional Aboriginal marriage be recognised as a marriage and that children of a traditional Aboriginal marriage be recognised as issue of a marriage for the purposes of the *Administration Act 1903* (WA).⁸³

That s 35(2) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) be repealed and replaced with a provision directing that distribution of an estate of an intestate Aboriginal person shall follow the order of distribution contained in s 14 of the *Administration Act 1903* (WA); however, where a person or persons of entitlement cannot be ascertained under s 14, a person or persons who enjoy a classificatory kin relationship under the deceased's customary law may apply to succeed to the estate.

That a new s 35(2A) be inserted into the *Aboriginal Affairs Planning Authority Act 1972* (WA) directing that proof of entitlement to an intestate Aboriginal estate as classificatory kin under s 35(2) of that Act shall be determined upon application to the Supreme Court and that such application may be made after one year of the date of death of the deceased.

That s 35(3) of the *Aboriginal Affairs Planning Authority Act 1972* (WA) dealing with moral claims be retained in its current form and that the regulations associated with moral claims (sub-regs 9(5) and (6) of the *Aboriginal Affairs Planning Authority Act Regulations*) also be retained.

That sub-regs 9(1)–(4) of the *Aboriginal Affairs Planning Authority Act Regulations 1972* (WA) be repealed.

The proposals above seek to rectify the problems observed in the operation of the Western Australian Aboriginal intestate distribution scheme. Importantly, implementation of these proposals would:

- Remove the potential of offence to Aboriginal people in the definition supporting application of the intestacy provisions of the AAPA Act.
- Remove the discriminatory provision that automatically vests administration of intestate Aboriginal estates in the Public Trustee and disallows family from privately administering the intestate estate of a deceased Aboriginal relative.
- Relax entitlement rules in relation to grants of letters of administration for intestate Aboriginal estates.
- Recognise traditional Aboriginal marriages as a marriage in relation to distribution of an intestate estate without the need to rely upon de facto laws.
- Recognise the broader range of kin (including classificatory kin) that might be entitled to distribution of an intestate Aboriginal estate.
- Remove the existing bias toward male relatives of an Aboriginal intestate deceased currently found in the order of distribution under the AAPA Regulations.
- Retain the right of people to make moral claims against an undistributed intestate Aboriginal estate.
- Retain the requirement that, where no moral claim is made or proved, the property in undistributed intestate Aboriginal estates be applied to the benefit of persons of Aboriginal descent where that estate would otherwise escheat to the Crown.
- Remove the *Marriage Act 1961* (Cth) limitation in relation to distribution of an intestate Aboriginal estate under the AAPA Act and Regulations.

The problem of proof

The above proposals broadly accord with the submissions of the Public Trustee on the subject of Aboriginal intestacy. The Commission believes that these proposals will remove the potentially discriminatory measures found in the current legislative scheme and allow for greater recognition of important classificatory kin relationships under the general law. However, the Commission acknowledges that issues may still exist in relation to proof of entitlement under s 14 of the *Administration Act*, particularly where a person's birth was not registered under Australian law or where an Aboriginal person was removed from his or her family

82. Consequential amendments may be required to s 12 of the *Public Trustee Act 1941* (WA) to enable the Public Trustee to apply for administration where requested by family or beneficiaries.

83. For specific detail of the Commission's proposal for recognition of Aboriginal traditional marriage in Western Australian legislation, see below Part VII.

The Commission believes that these proposals will remove the potentially discriminatory measures found in the current legislative scheme and allow for greater recognition of kin relationships.

pursuant to previous government policies in Western Australia.⁸⁴ The Commission therefore invites submissions on whether a relaxed standard of proof should apply in these circumstances. As it appears that the procedures attached to the moral claim process under the AAPA Act are currently working well, the Commission suggests that a similar process may be put in place to determine the entitlement of a person of unregistered birth to an Aboriginal intestate estate. However, the Commission is aware that, if the current provision vesting all intestate Aboriginal estates in the Public Trustee is removed, the Public Trustee may not be the appropriate body to investigate or cause investigations to be made to support this procedure.

Invitation to Submit 9

The Commission invites submissions on whether, in circumstances where an Aboriginal person claims entitlement to distribution of an intestate Aboriginal estate but has no proof of relationship to the deceased (because his or her birth was not registered under Australian law or because the claimant was removed from his or her family pursuant to previous government policies in Western Australia), a recommendation of the Minister of Indigenous Affairs as approved by the Governor should be taken as conclusive evidence of entitlement to succeed to that estate.

The Commission also seeks submissions on the appropriate body to conduct investigations to support recommendations to the Governor in this respect.

Release of funds of intestate estates by financial institutions

It was noted earlier that s 139 of the *Administration Act 1903* (WA) authorised financial institutions to release funds from the deceased's account to the

spouse, child, defacto partner or parent of a deceased without the requirement of formal letters of administration or a grant of probate. The intent of this section is to allow the release of funds for funeral and other expenses incidental to the death. Currently, the gazetted amount permitted for release under this section is \$6,000; however, as mentioned above, financial institutions regularly exceed that amount, sometimes paying out up to \$50,000.⁸⁵

Clearly the gazetted amount of \$6,000 (proclaimed in 1983) no longer meets the needs of families of a deceased and would not in all cases be sufficient to cover funeral and related expenses. Financial institutions are evidently responding to this by authorising the release of much larger sums. However, these institutions currently appear to be acting without legal authority and could potentially be held liable for the discretionary release of funds over the prescribed amount, particularly if released to the wrong person.⁸⁶ In these circumstances, and in recognition of the importance of this provision in facilitating the distribution of small estates of intestate Aboriginal deceased persons, the Commission suggests that the gazetted amount be reviewed and updated. At the time of writing the Office of the Public Trustee of Western Australia suggested that \$30,000 would, in all the circumstances, be appropriate.

Proposal 53

That the prescribed amount declared by proclamation pursuant to s 139(1) of the *Administration Act 1903* (WA) be reviewed and updated to an amount appropriate at the date of proclamation.

The importance of wills

One way to ensure that relevant Aboriginal customary laws of distribution are observed by the Western

84. It is apparent that prior to 1970 not all births of Aboriginal people were recorded and registered.

85. According to anecdotal information provided by the Public Trustee's Client Services Centre. See above n 41.

86. Section 139 of the *Administration Act 1903* (WA) permits a manager of a financial institution to release the prescribed amount to 'any person *who appears to the satisfaction of the manager of the [bank] to be the widower, widow, parent or child*' or de facto partner of the deceased. (Emphasis added.)



Australian law upon death is to make a will. Such a measure can provide Aboriginal people the opportunity to express their customary law in terms of their own knowledge and beliefs.⁸⁷ As well as recording a testator's wishes regarding the distribution of his or her property upon death, wills have the advantage of being able to record the testator's wishes in relation to location of burial and necessary burial rites to be applied upon death and can deal with a range of customary obligations. Vines states:

Drafting wills to protect customary law obligations and general property rights for Aboriginal people might call for a considered use of testamentary trusts (trusts created by wills) including secret and half-secret trusts (where either the existence or the substance of the trust is undisclosed in the will but is known to the trustee), discretionary trusts (giving power of decision-making to the trustee) and life estates (gifts for the lifetime of a person). Guardianship and control of children are also important – although the enforceability of testamentary guardianship is ultimately up to the

Court rather than the testator, a will is still the most effective way of protecting children after the death of parents. All these constructs are ways of protecting information or people, and are far easier to protect if they are established by a will than by a gift given during the giver's life in a customary law context.

Wills can operate to ensure that customary law obligations spelt out in the will (or even as half-secret trusts to ensure confidentiality) are recognised and given legal force by the common law.⁸⁸

The Commission believes that more could be done by government to encourage Aboriginal people to make wills to ensure that their wishes (be they customary law related or otherwise) are observed by the general law upon death.⁸⁹ The Commission suggests that the Department of Indigenous Affairs and the Public Trustee might be jointly funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.

Proposal 54

That the Department of Indigenous Affairs and the Public Trustee be jointly funded to establish a program aimed at educating Aboriginal people about the value of wills and also about their entitlements, rights and responsibilities under Western Australian laws of succession.

Family Provision

Entitlement to distribution of both testate and intestate estates in Western Australia is qualified by claims made for family provision under the *Inheritance (Family and Dependants Provision) Act 1972* (WA). Under this Act a person may make a claim against an estate if, by the deceased's will or by virtue of the rules governing intestacy, adequate provision has not been made from the estate for the proper maintenance, support, education or advancement in life of that person.⁹⁰ Under s 7(2) of the Act, applications for family provision must be made to the Supreme Court within six months of the date of grant of letters of administration or probate; although this date can be

87. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 98.

88. Vines P, 'Wills as Shields and Spears: The failure of intestacy laws and the need for wills for customary law purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16, 18.

89. This suggestion was first raised by participants at the Commission's community consultations in Kalgoorlie.

90. *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6.

extended with the leave of the Court.⁹¹ An order for family provision may be in the form of a lump sum payment from the estate or for payment on a periodical or other basis.⁹²

The persons that may make a claim of entitlement to provision from an estate under the provisions of the Act are:

- a person who was married to, or living as the de facto partner of, the deceased person immediately before the death of the deceased person;
- a person who at the date of death of the deceased was receiving or entitled to receive maintenance from the deceased as a former spouse or former de facto partner of the deceased whether pursuant to an order of any court, or to an agreement or otherwise;
- a child of the deceased living at the date of the death of the deceased, or then *en ventre san mere* [unborn];
- a grandchild of the deceased who at the time of death of the deceased was being wholly or partly maintained by the deceased or whose parent the child of the deceased had predeceased the deceased living at the date of death of the deceased, or then *en ventre san mere* [unborn];
- a parent of the deceased, whether the relationship is determined through lawful wedlock or otherwise, where the relationship was admitted by the deceased being of full age or established in the lifetime of the deceased.⁹³

It will be clear from this list that the current state of the law in Western Australia does not provide adequately for the extended kin relationships recognised in Aboriginal society. It has been mentioned

throughout this paper that Aboriginal people take their kinship obligations at customary law very seriously and that these obligations may include the provision of housing, financial assistance, education or general support of persons in a classificatory kin relationship. In particular, child-rearing in Aboriginal society is often shared and the responsibility for provision for a child may fall with different kin throughout that child's life.⁹⁴ In these circumstances there is scope for a person in a customary law kin relationship with a deceased at the time of his or her death who is wholly or partly dependant upon the deceased to be inadequately provided for in the distribution of an Aboriginal deceased estate. The Commission therefore makes the following proposal for reform of family provision legislation in Western Australia.

Proposal 55

That the list of persons entitled to claim against a testate or intestate estate of an Aboriginal person under s 7 of the *Inheritance (Family and Dependants Provision) Act 1972* (WA) be extended to include a person who is in a kinship relationship with the deceased which is recognised under the customary law of the deceased and who at the time of death of the deceased was being wholly or partly maintained by the deceased.

That traditional Aboriginal marriage be recognised as having the same rights as a marriage and that children of a traditional Aboriginal marriage be recognised as having the same rights as issue of a marriage for the purposes of the *Inheritance (Family and Dependants Provision) Act 1972* (WA).⁹⁵

91. Orders for family provision may also be made under s 65 of the *Trustees Act 1962* (WA) where the estate of the deceased, or part thereof, has been distributed among the persons entitled under a will or intestacy: *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 8.

92. *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(4). However, in determining whether and in what way provision should be made by an order the Court will have regard to any assets already distributed to ensure that the order is not inequitable: *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 9.

93. *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 7.

94. See the more detailed discussion of Aboriginal child-rearing practices in Part VII below.

95. For specific detail of the Commission's proposal for recognition of Aboriginal traditional marriage in Western Australian legislation see below Part VII.

Guardianship and Administration

The *Guardianship and Administration Act 1990* (WA) establishes a system to protect the rights of people with decision-making disabilities. In particular, it enables a substitute decision-maker to be appointed to make decisions in the best interests of the represented person. There are two types of substitute decision-makers that can be appointed:

- a guardian who makes lifestyle decisions for the represented person; and
- an administrator who makes financial and legal decisions for the represented person.

The Office of the Public Advocate was established by the *Guardianship and Administration Act* to protect and promote the rights of people with decision-making disabilities such as dementia, intellectual disabilities, mental illnesses or acquired brain injuries. A primary role of the Public Advocate is to conduct investigations and advocate as to whether a guardian or administrator should be appointed by the State Administrative Tribunal¹ as a substitute decision-maker for a person with a decision-making disability. The Public Advocate will act 'as a guardian of last resort where no other person is willing or able to be appointed as guardian';² while in cases where no suitable or willing person can be found to act as administrator, the Public Trustee will be appointed to make financial decisions on behalf of the person. Other services of the Office of the Public Advocate include:

- Providing information and advice on how to deal with concerns, problems or conflicts which impact upon the quality of life of people with a decision-making disability.
- Investigating complaints or allegations that the wellbeing of a person with a decision-making disability may be at risk or is being abused.

- Conducting community education and training in regard to the guardianship and administration system in Western Australia.
- Advocating for improvements in services, policies and programs for people with decision-making disabilities.³

Concerns have been raised about the limited number of Aboriginal people accessing the services provided by the Office of the Public Advocate. In August 2000 a study was commissioned by the Public Advocate to investigate the needs of Aboriginal people in the guardianship and administration system in Western Australia. The study included a review of relevant literature and statistical information and consultations with Aboriginal people and Aboriginal and non-Aboriginal service providers in Western Australia. The findings of that study were published in October 2001.⁴

Concerns About Guardianship and Administration in Relation to its Application to Aboriginal People in Western Australia

The study commissioned by the Public Advocate found that there is a growing demand for substitute decision-making among Aboriginal people in Western Australia. This finding was supported by the following facts:

- The Indigenous population is growing at a rate significantly faster than the non-Indigenous population.
- Indigenous people suffer generally poor health and are more likely to suffer from the effects of chronic ill health and substance abuse.
- On all indicators Indigenous people are severely disadvantaged.

1. The State Administrative Tribunal considers applications and makes and reviews orders for the appointment of a guardian or administrator. The State Administrative Tribunal assumed the functions of the Guardianship and Administration Board under the *Guardianship and Administration Act 1990* (WA) on 24 January 2005.

2. Office of the Public Advocate (WA), Letter to the LRCWA (19 June 2003) 1.

3. Ibid.

4. Office of the Public Advocate (WA), *Needs of Indigenous People in the Guardianship and Administration System in Western Australia* (October 2001).

- Social and economic disadvantage are associated with a higher prevalence of disability.
- Indigenous people encounter the ageing process earlier than non-Indigenous people.
- Among Indigenous people there is evidence of growing levels of decision-making incapacity resulting from the combined effects of severe disadvantage associated with substance abuse, early ageing, psychiatric disability, brain damage and traumatic life events such as motor vehicle accidents.
- In many Indigenous communities elderly people are left with little family support as younger people move to regional centres or towns.
- Indigenous people are more likely to live outside of major cities and regional towns, limiting their access to services.
- The often reported breakdown of the 'family obligation' value base of Indigenous cultures will decrease the extent to which younger family members care for older and disabled family members, increasing their reliance on services.⁵

The study also reported the existence of factors that impact upon the willingness and capacity of Aboriginal people to access assistance generally from government services including fear of dealing with 'white' authorities, low levels of literacy and remoteness of residence.⁶ In relation to accessing the services provided by the guardianship and administration system in Western Australia, the study found that Aboriginal cultural beliefs often inhibited such access because of a belief in the inappropriateness of taking family issues outside the family or kin context.⁷ However, a primary finding of the report was that there was very little knowledge of the existence of the guardianship and administration system and the services offered by government in this regard. It was found that this lack of awareness also extended to Aboriginal and non-Aboriginal service providers including other government agencies.⁸

The report listed several recommended strategies for change to enhance the system and improve its capacity to meet the needs of Aboriginal people in guardianship and administration. These strategies can be summarised as:

- Development of policy and guiding protocols by the Public Advocate and the Guardianship and

Administration Board (now the State Administrative Tribunal) in relation to Aboriginal people and development of a shared contact database of local Aboriginal advisors in metropolitan and regional centres in Western Australia.

- Closer working relationships and formal service agreements with Aboriginal agencies to enable improved identification of and responses to the guardianship and administration needs of Aboriginal people at the local level.
- Enhancement of community education strategies including Plain English documentation.
- Enhancement of hearing and reporting processes (including application procedures) by the Guardianship and Administration Board (now the State Administrative Tribunal) to ensure that such processes are culturally appropriate and accessible to Aboriginal people, including Aboriginal people appointed as administrators.
- The appointment of Aboriginal staff.⁹

Although the brief for the Public Advocate's study did not include the role of the Public Trustee in the administration of trusts, financial or legal affairs of Aboriginal peoples the subject of a formal administration order, a substantial number of those interviewed for the study expressed concerns about the Public Trustee's management of the affairs of Indigenous clients.¹⁰ The report found that in some cases the management of clients' funds by the Public Trustee limited the capacity of service providers to purchase items they considered necessary for the comfort or care of their clients. One example given was of a regional nursing home that had five Aboriginal residents whose financial affairs were managed by the Public Trustee, three of whom required a particular type of chair. The nursing home reported that the approval of expenditure for the purchase of these chairs had taken an exceedingly long time which had created problems for their clients who were required to share the chairs of other patients.¹¹ Another more disturbing case study involved an Aboriginal man who had received a compensation payout in excess of \$1 million. The report stated:

5. Ibid 58–59.

6. Ibid 59.

7. Ibid 60.

8. Ibid.

9. Ibid 75–77.

10. In fact, the authors of the study stated that '[i]n spite of repeated attempts to clarify the situation it was very difficult to engage people in conversations that were *not* about the Public Trustee': Ibid 43, 57.

11. Ibid 47.

He was sleeping on tarpaulins because he was unable to access money for proper bedding. The man wanted to go to a funeral, however he was told that funds would only be released to cover half his share of petrol and lunch. Culturally this was seen as offensive and totally inappropriate.¹²

The lack of culturally appropriate alternatives to the Public Trustee in respect of the administration of financial and legal affairs of Aboriginal clients was noted as a particular concern of Aboriginal peoples consulted for the report.¹³

Implementing Change to Improve Guardianship and Administration Services to Aboriginal People in Western Australia

Office of the Public Advocate

The Public Advocate has reported to the Commission¹⁴ that many of the strategies recommended by the report have been implemented by that Office. In particular, the Office has made considerable gains in increasing awareness of its services and of the guardianship and administration system as a whole to Aboriginal people in Western Australia. This has been achieved by extensive community education and by the implementation of a telephone advisory service. The Office has also extended its reach to regional and remote Aboriginal communities by establishing formal partnerships and protocols with Aboriginal and non-Aboriginal service providers. Education of staff in government agencies likely to come into contact with Aboriginal people who may need the services of the Public Advocate is ongoing. Presently the Public Advocate is investigating the problem of 'elder abuse'¹⁵ which appears to be prevalent in Aboriginal communities.¹⁶ Two Aboriginal project officers have been appointed to undertake consultations in communities and establish the extent of the problem and explore possible solutions.¹⁷ The Commission commends and supports the efforts of the Office of the Public Advocate in the implementation of strategies identified by the study to improve knowledge of, and access to, services for Aboriginal people.

State Administrative Tribunal

The Commission is not aware of any Aboriginal-specific enhancements to the hearing or review processes in relation to guardianship and administration applications in respect of Aboriginal people. In particular, there is no evidence that the suggested strategies contained in the report commissioned by the Public Advocate have been considered or implemented by the State Administrative Tribunal. However, it must be acknowledged that the Tribunal only assumed the functions of the previous Guardianship and Administration Board in late January 2005 and that improvements—particularly in relation to the accessibility of the Tribunal's services and procedures—are ongoing. It must also be noted that very few applications for guardianship and administration in relation to Aboriginal people are currently made before the Tribunal. Nonetheless, the Indigenous-specific education strategies currently being undertaken by the Public Advocate to improve awareness amongst Aboriginal people of the guardianship and administration system in Western Australia may well result in an increase in the number of Aboriginal applications being heard by the Tribunal. In these circumstances it would be desirable for the Tribunal to assess the cultural appropriateness of its guardianship and administration procedures and to develop a set of protocols and guidelines for tribunal members in relation to the management of hearings involving Aboriginal people.

Proposal 56

That the State Administrative Tribunal assess the cultural appropriateness of its guardianship and administration procedures and consider the development of a set of protocols and guidelines for tribunal members in relation to the management of hearings involving Aboriginal people.

Office of the Public Trustee

Because the study commissioned by the Public Advocate did not contain a brief regarding the Public Trustee's role in the administration of the financial affairs of Aboriginal peoples within the guardianship and administration system, no specific recommendations

12. Ibid 57.

13. Ibid.

14. In telephone discussion with the Commission on 25 May 2005.

15. Elder abuse can include financial abuse (having money taken from pension accounts without authority or having property taken), physical abuse, sexual abuse, psychological abuse (including threats), social abuse (being ignored or denied contact with family or friends) and neglect. See Public Advocate, *Caring for and Respecting Older People in Our Communities*, Brochure (May 2005).

16. 'Study to Spotlight Aboriginal Elder Abuse', *Message Stick Online*, 20 May 2005.

17. Ibid.

were made relating to that Office. Nonetheless, the Commission is concerned about the very explicit examples of unnecessary delay in release of trust funds and culturally inappropriate management of affairs of Aboriginal people by the Public Trustee contained in the report and discussed above. During the Commission's consultations with Aboriginal people throughout the state, the opinion was expressed that the Public Trustee needed 'more cultural [awareness] training'.¹⁸ While the description in the *Public Trustee's Annual Report 2003/2004* of the extent of cultural awareness training provided to employees appears to be adequate, there are clearly issues in relation to the trust administration of Aboriginal clients that need immediate attention. The Commission has made reference above¹⁹ to the possible need for more localised Aboriginal input into cultural awareness training in relation to the Public Trustee's administration of intestate Aboriginal estates and repeats this concern in regard to its trust management functions.

The Commission also supports the observation in the report commissioned by the Public Advocate about the need to find culturally appropriate alternatives to the Public Trustee for the management of administration orders under the *Guardianship and Administration Act*. However, it is noted that the management of the financial affairs of Aboriginal people by the Public Trustee is not limited to people who are the subject of orders under the Act. Anecdotal evidence suggests that many Aboriginal people who have come into a significant sum of money as a beneficiary of an intestate Aboriginal deceased will place that money in trust with the Office of the Public Trustee. Because the current statutory regime in Western Australia automatically vests the estate of an intestate Aboriginal deceased in the Public Trustee, there is the potential for conflict of interest where a beneficiary subsequently appoints the Public Trustee to administer his or her financial affairs (in particular, the money claimed from the deceased estate).²⁰ In these circumstances the Commission is concerned that Aboriginal beneficiaries of deceased estates administered by the Public Trustee are made aware of alternatives for the financial management of their inheritance (including management by family members or private financial managers) and that these alternatives are appropriately communicated with the

assistance of an independent legal or financial advisor and, if required, an interpreter.

Proposal 57

That, in the absence of appointment under an administration order by the State Administrative Tribunal or other judicial body, the Public Trustee ensure that Aboriginal beneficiaries of deceased estates administered by the Public Trustee are made aware of alternatives for the financial management of their inheritance before accepting the administration of the financial and/or legal affairs of those beneficiaries. And, that these alternatives are communicated in a culturally appropriate way with the assistance of an independent legal or financial advisor and, if required, an interpreter.

Other Matters

Although the findings of the study commissioned by the Office of the Public Advocate indicate that problems with the interaction of Aboriginal cultural beliefs and the guardianship and administration system do exist, the Commission has not received any direct submissions on this matter.²¹ This lack of submissions is undoubtedly a reflection of the low level of awareness of the system among Aboriginal communities; but, without the support of submissions indicating concerns of Indigenous people in relation to guardianship and administration, the Commission is not in a position to usefully add to the findings and recommendations of the study commissioned by the Public Advocate. Therefore, the Commission would like to invite submissions on this subject from interested parties, particularly in the context of relevant customary laws or cultural beliefs.

Invitation to Submit 10

The Commission invites submissions from interested parties on the capacity of the guardianship and administration system in Western Australia to adequately meet the needs of Aboriginal people. In particular, the Commission invites submissions on the cultural appropriateness of the guardianship and administration system and its interaction with Aboriginal customary laws and cultural beliefs.

18. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18.

19. See 'Succession: Cultural awareness training in the administration of intestate Aboriginal estates by the Public Trustee', above p 288.

20. The conflict of interest arises because the Public Trustee claims a fee for management of financial affairs and trust administration.

21. Although the Commission did receive submissions which impact upon the work of agencies involved in guardianship and administration including concerns about mental health issues, the treatment of elders by youth and the potential exploitation of elderly grandparents as primary care-givers and financial providers in relation to grandchildren. These concerns are individually discussed in Part II and Part VII of this report.

Coronial Inquests

The interaction between Australian law and Aboriginal customary law in relation to coronial inquiries was cited as a cause for concern and frustration in the Commission's consultations with Aboriginal people. The Commission heard of a number of cases where Aboriginal people felt that their customary law was misunderstood or ignored when white authorities became involved in investigating the death of an Aboriginal person. The practices of coroners came under the spotlight in 1991 when no less than 35 recommendations were made by the RCIADIC in relation to the coronial investigation of Aboriginal deaths in custody. This section will begin by examining the role of 'inquests'¹ into deaths in traditional Aboriginal societies. It will then examine the conduct of coronial matters under Western Australian law and discuss the potential of conflicts between the general law and Aboriginal customary law. Consideration will then be made of the desirability and need of changes to the general law to recognise Aboriginal customary laws and other special needs of Aboriginal people in the coronial process.

The Role of Inquests into Deaths in Traditional Aboriginal Societies

Anthropological studies reveal that inquests into the cause of death of a member of a group were common in traditional Aboriginal societies.² Like the position under Australian law, an inquest would usually only be held if

a death was considered suspicious;³ but because Aboriginal people traditionally considered only the deaths of the very old or very young to be attributable to natural causes,⁴ the performance of inquests was probably more frequent than in Western society. Generally, deaths of young children or infants would not be followed by inquests;⁵ however, if the deceased was a male in his prime of life an inquest would almost certainly be carried out, often followed by a revenge expedition.⁶ In the case of deaths of women and older men, an inquest may be held but the results of the inquest may be less likely to be acted upon by retaliation.⁷

The form of an inquest following a death in traditional Aboriginal societies varied from group to group with sometimes several methods of inquest practised within one group.⁸ Through use of these various methods the native doctor would seek to identify the individual or group responsible for the death.⁹ In the western deserts the prevalent type of inquest was the examination of bones of an exhumed body;¹⁰ while in the south-west of Western Australia it was common to examine the signs on the ground surrounding the grave.¹¹ It has also been observed that in the Northern Kimberley, small 'inquest' stones, each representing a possible 'murderer', were set up around a grave and 'drops of blood are supposed to pass from the buried body to the actual murderer's stone'.¹² In the southern-central Kimberley region of Western Australia this practice is recounted in traditional narratives; however,

1. For the sake of continuity, the Commission has used the word 'inquest' throughout this section to refer to both coronial inquests under Australian law and investigations or inquiries into deaths by traditional Aboriginal societies.
2. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 353.
3. For instance, an inquest would not generally be thought necessary where a victim had been killed in an open fight and the killer was able to be identified: *ibid* 473. But cf Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.
4. Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 79.
5. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 344; Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.
6. Elkin, *ibid* 344.
7. *Ibid*.
8. *Ibid*. See also Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 474.
9. Berndt & Berndt, *ibid* 353.
10. *Ibid* 354; Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 85–86.
11. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 349. See also Berndt & Berndt, *ibid* 474: 'Native doctors look for the presence of signs, which they can interpret: a small hole, for instance, or the tracks of some animals, bird or reptile. They may not specify a particular person, but merely locate a murderer "socially".'
12. Elkin, *ibid* 346. See also Berndt & Berndt, *ibid* 475.

in that region the corpse was typically raised on a tree platform below which was placed a circle of 'named' stones.¹³ When the juices of the decomposing body fall on these stones, the native doctor is said to be able to discern the person responsible for the death or alternatively from which direction the sorcery (which resulted in the death) originated.¹⁴ Finally, in some parts of the north-west of the state, the deceased's 'hair is pulled while the names of various local groups are called, the hair being said to come out at the mention of the guilty one'.¹⁵

The purpose of a traditional Aboriginal inquest is to explain the death and allow the family of the deceased to consider whether they wish to take matters further¹⁶ – whether by initiating revenge or by demanding compensation to settle the grievance.¹⁷ The Berndts suggest more bluntly that 'an inquest is held in order to find a scapegoat, a person or group which can be held responsible for a death'.¹⁸ However, traditional narratives indicate that an inquest sometimes failed to identify the individual responsible for the death.¹⁹ In these circumstances a second inquest may be held. For example, if a tree platform inquest failed to produce an answer, hot 'named' stones might be placed into the body;²⁰ the Gooniyandi of the Kimberley believed that the person responsible for the death would then fall ill and die.²¹ This would not only reveal the identity of the murderer but also avenge the death by sorcery. In the event that this second inquest was not successful, the death would be explained as accidental or alternatively the deceased would be understood to have himself been responsible for killing another.²²

The extent to which traditional inquests involving full burial rites are practised by Aboriginal groups today is not entirely clear. Research indicates that while some groups may still practise a form of cultural inquiry

following a death, the body itself would most likely be dealt with according to Australian law (that is, applying general mortuary and burial or cremation practices).²³ The Commission's consultations appear to suggest that Aboriginal people are accepting of white institutional involvement in deaths, even if there are concerns about the cultural appropriateness of this involvement in some instances.

Coronial Inquests and the Role of the Coroner in Western Australia

As with traditional Aboriginal inquests, the primary purpose of a coronial inquest is to find an explanation for a death; however, unlike traditional Aboriginal inquests, a coronial finding cannot be taken as an unequivocal finding of guilt or responsibility for a death. Although a coronial finding may result in a person being charged with the crime of causing or contributing to the death of another, the finding of guilt is a function of the criminal justice system. The normal rules of evidence and adversarial process that govern Western Australian courts in criminal matters do not apply in relation to coronial inquests. The inquisitorial nature of the coronial process was described by Lord Lane in *R v South London Coroner; ex parte Thompson*:

[I]t should not be forgotten that an inquest is a fact-finding exercise and not a method of apportioning guilt. The procedure and rules of evidence which are suitable for one are unsuitable for the other. In an inquest it should never be forgotten that there are no parties, there is no indictment, there is no prosecution, there is no defence, there is no trial, simply an attempt to establish the facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance ...²⁴

13. Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.

14. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 353.

15. *Ibid* 475.

16. *Ibid* 354.

17. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 344. The Commission's consultations in Wiluna reported that 99 per cent of deaths involve payback punishment delivered at the funeral gathering. It was not clear how responsibility was established for a death but it was said that it was usually 'due to "blame" or some past event'. See LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.

18. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 473.

19. Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.

20. *Ibid*.

21. *Ibid*.

22. *Ibid*.

23. *Ibid* 104. Bohemia and McGregor state that inquests are no longer held by the Gooniyandi and that deaths are dealt with by white institutions; although there is some suggestion that traditional inquests (without full rites) are still held by the desert peoples of Fitzroy Crossing.

24. As cited in Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 42.

The *Coroners Act 1996* (WA) governs all matters relating to coronial inquests and the role of the State Coroner in Western Australia. Section 8 of the Act requires the coroner to investigate all 'reportable' deaths and to hold an inquest where necessary. A reportable death occurs where a doctor is unable to determine a cause of death or where the death is believed to have occurred in suspicious or prescribed circumstances.²⁵ In such a case the death must be reported to the police or to the coroner and the coroner must investigate the death and consider whether it is necessary to hold an inquest to determine the cause of death and responsibility for the death. In some instances the coroner is directed by law to hold an inquest into a death. For example, s 22 directs that a coroner must hold an inquest when a body is found in prescribed circumstances (such as in exposed conditions); where a death has occurred in care or custody; or where a member of the Police Force may have been involved in the death.²⁶

Once a death has been reported the coroner assumes control of the body under s 30. The body may be held for the purposes of investigation until such time as the coroner issues a certificate under s 29(1) permitting disposal or release of the body. During the investigation process the coroner has a duty to inform the deceased's senior next of kin²⁷ about the process and notify them of their right to view the body.²⁸ The senior next of kin also has certain rights in relation to how the body is dealt with in the coronial process, such as the right to examine authority for removal of tissue from the deceased or the right to object to post-mortem examination of the body.²⁹ In the latter case if the coroner believes that it is necessary to proceed with the post-mortem examination, the coroner must give a written notice immediately to the senior next of kin. The senior next of kin may then apply, within 48 hours, to the Supreme Court for an order restraining the performance of the post-mortem examination.³⁰ The Supreme Court may make such order where it is

satisfied that in all the circumstances that is the desirable course.³¹

Managing Potential Conflicts between Coronial Practices and Aboriginal Customary Law in Western Australia

The coronial investigation process

From the descriptions of traditional inquests set out earlier, it is clear that Aboriginal people are familiar with the notion of inquiry into the cause of a death and the benefit gained by processes that seek to explain a death. Nonetheless, the duties of a coroner to investigate certain deaths will often conflict with Aboriginal groups whose beliefs demand that the deceased be buried expeditiously.³² In Aboriginal societies the burial rites came first and inquests were often delayed until after the immediate mourning period was over. The Berndts suggest that delays in performing inquests served the purpose of allowing people 'the opportunity to think things over more calmly' leaving 'less likelihood of rash or impetuous action'.³³ Another explanation is that many of the traditional inquest practices involve examination of the gravesite or exhumation of bones some months after burial, necessitating some delay in determination of the cause of a death.³⁴

It has been observed elsewhere that the unresolved grief in Aboriginal families following a death (in particular, a sudden death) can lead to 'dangerous health consequences'.³⁵ In relation to reportable or suspicious deaths which are referred to the coroner, this grief may be compounded by the family's loss of control over the body of their loved one and the potential of an autopsy as well as the probability of delay in burying the body and allowing the spirit to be 'at rest'. In

25. *Coroners Act 1996* (WA) ss 3, 17.

26. Although an inquest must not proceed where criminal proceedings have been instituted in relation to a particular death: *Coroners Act 1996* (WA) s 53.

27. 'Senior next of kin' is defined in *Coroners Act 1996* (WA) s 37(5). A discussion of this definition in the context of Aboriginal kinship may be found at pp 306–307 and following under 'Definition of "Senior Next of Kin"'.

28. *Coroners Act 1996* (WA) ss 20 & 30(2).

29. *Coroners Act 1996* (WA) s 37.

30. *Coroners Act 1996* (WA) s 37(3).

31. *Coroners Act 1996* (WA) s 37(4).

32. Freckleton I, 'Autopsy Law: Multiculturalism working successfully' (1998) 6 *Journal of Law and Medicine* 5.

33. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 474.

34. See Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 345.

35. Parry A, Benger N & Weeramanthri T, 'Counselling Services Attached to Coroner's Offices Across Australia' (1996) 20(1) *Aboriginal and Islander Health Worker Journal* 9, 10.

Western Australia, the dearth of specialist pathologists in regional areas means that in many cases, where a death is suspicious or occurred in custody, the body will be removed to Perth for examination. The body must then be returned to the place of death (or the place of burial if costs are equivalent) after the coroner is satisfied that the body may be released. These requirements can result in substantial delays in burial and extended periods of mourning for Aboriginal communities.³⁶



recommendations which might prevent similar deaths in the future.³⁹

Should Aboriginal customary law be recognised in the coronial process?

In the context of the present Terms of Reference the question arises, 'Should Aboriginal customary law be recognised such that it may prevail over the public interest in ascertaining the cause of a suspicious death?'³⁷ The immediate answer to this question must be 'No'. There are several compelling reasons for this. Firstly, the coroner has an important role to play in the process of investigating deaths, in particular suspicious deaths, and in assisting authorities to bring persons responsible for a death to justice. Coronial investigations also play a part in the assessment of provision of health services: the coroner's office might be the first to discover an instance of a particular disease in Western Australia and be able to cause positive steps to be taken to prevent the disease from spreading throughout the community.³⁸ In fact, as the Coroner's Guidelines set out:

It is the paramount duty of any State to protect the lives of its citizens. To this end, it is important that the Coronial System monitor all deaths and particularly that it provides to the community a review of the circumstances surrounding deaths that appear preventable. Every effort should be made to obtain

Secondly, the public interest in discovering the cause of a suspicious death is also in the interests of Aboriginal people, not least because it may provide an explanation for the death, in particular in places where traditional inquests are no longer practised. Indeed, the Commission's consultations in the Pilbara recorded concern with the approach of police to investigating Aboriginal deaths, which were considered to be pursued with less alacrity than the death of a white person.⁴⁰ There is thus a need to satisfy Aboriginal people's demand for proper investigation of a suspicious death which must be balanced against the desire for customary laws on coronial matters (including autopsies) to be recognised. Finally, if Aboriginal deaths in suspicious circumstances were not investigated due to traditional beliefs, then this could present a problem in terms of accountability for deaths, particularly deaths in custody.

Although, for the reasons outlined above, the Commission does not consider it appropriate to propose wholesale recognition of Aboriginal customary laws in respect of coronial matters, there are practical ways of easing the emotional burden of Aboriginal families in relation to coronial processes. The following sets out some known conflicts between customary laws and

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36. This issue was recognised in the 1999 review of the *Coroners Act* and a recommendation was made that the State Coroner issue a guideline to regional coroners directing them to develop protocols to deal with the transporting of bodies of deceased persons within their regions taking into account any specific requirements or difficulties experienced by communities, in particular, Aboriginal communities. Whilst it is apparent that a guideline has not been issued, it is understood that the matter has been dealt with procedurally. Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 18–19. See 'Recommendations of the Chivell Review Relating to Aboriginal People and the Coronial Process: Transport of bodies', below pp 308–309.
37. As discussed earlier, the case law in Western Australia demonstrates that, whilst there is no legislative provision expressly directing the coroner to consider the cultural beliefs or customary law of a deceased's family in relation to performing an autopsy, a court will give effect to the customary law of a deceased where the death is not, on the evidence available, suspicious. See, eg, *Re Death of Unchango (Jr)* (1997) 95 A Crim R 65.
38. In Western Australia the Coroner's Court has made considerable efforts to explore important issues relating to Indigenous health and services with Aboriginal communities who have been affected by the untimely deaths of youths, particularly as a result of petrol sniffing. This information feeds into internal reviews of coronial processes and ways in which these processes can assist in improving the quality of Aboriginal health. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter to the LRCWA (4 July 2005) 4–5.
39. This is particularly important for deaths in custody. See Hope A, 'Coronial Best Practice' (Paper presented at the Best Practice Interventions in Corrections for Indigenous Peoples Conference, Adelaide, 13–15 October 1999) 1.
40. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 18.

coronial practices in Western Australia and makes proposals for practical reform in recognition of Aboriginal cultural beliefs and customary laws.

Cultural Objections to Autopsy

There have been cases where Aboriginal people have objected to an autopsy being performed on the ground that it was contrary to the cultural beliefs of their particular group.⁴¹ In these instances the court is required to weigh the public interest in identifying the cause of death against the interest of the family to preserve the deceased's body. In *R v Price*⁴² the balancing process was stated as follows:

It would be intolerable if [the coroner] had power to intrude without adequate cause upon the privacy of a family in distress and to interfere with their arrangements for a funeral. Nothing can justify such interference except for a reasonable suspicion that there may have been something peculiar in the death, that it may have been due to other causes than common illness.⁴³

The authorities support the proposition that the views of the family will prevail provided there are no suspicious circumstances.⁴⁴ Where there are no suspicious circumstances an objection is only likely to be overruled where post-mortem is sought for essential scientific inquiry or medical education purposes.⁴⁵

The leading case in Western Australia is *Re Death of Simon Unchango (Jr)*.⁴⁶ In that case the coroner had notified the parents of a child who had died aged 12 days that a post-mortem examination would likely be conducted. The father (a full-blood Aboriginal from the east Kimberley region) objected to the post-mortem for cultural and religious reasons. In ordering that no post-mortem examination be performed, Walsh J stated that he did not underestimate the strength of the Aboriginal family's views which

rely not only on the desecration of the body ... but more than that, the proper appreciation as to the significance of the spirit staying in the body and the effect that it has if the body is cut up of the spirit leaving the body and roaming around and not entering Dreamtime. That is a matter of grave concern to those in the Aboriginal community who hold those views and their cultural beliefs must and will be respected and given weight by the courts in this country.⁴⁷

Significantly, in *Unchango* there were no suspicious circumstances surrounding the death; however, Walsh J indicated that if such circumstances did exist, then a coronial intervention would be justified.⁴⁸ The court cautioned that this case should not be taken as a precedent for those who hold such cultural beliefs and that each case would be considered on its own facts.⁴⁹

The Commission's consultations in the Gascoyne region revealed that there were concerns in the Aboriginal community about autopsy practices and genuinely held fears that body parts or organs removed from a body might not be returned.⁵⁰ In 1991 the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) noted the legitimacy of Aboriginal cultural objections to autopsy and recommended (recommendation 38) that:

[T]he State Coroner ... consult generally with Aboriginal Legal Services and Aboriginal Health Services to develop a protocol for the resolution of questions involving the conduct of inquiries and autopsies, the removal and burial of organs and the removal and return of the body of the deceased. It is highly desirable that as far as possible no obstacle be placed in the way of carrying out of traditional rites and that relatives of a deceased Aboriginal person be spared further grief. The Commission further recommends that the Coroner conducting an inquiry into a death in custody should be guided by such protocol and should make all reasonable efforts to obtain advice from the family and community of the deceased in consultation with relevant Aboriginal organisations.⁵¹

41. Although post-mortem examination of internal organs for the purposes of inquiring into the cause of a death is not unheard of in traditional Aboriginal societies, such practices were largely confined to the eastern parts of Australia. See Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 353; Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 349.

42. *R v Price* (1884) 12 QBD 247.

43. *Ibid* 248 (Stephen J).

44. *Ronan v The State Coroner* [2000] WASC 260; *Re the Death of Unchango (Jr)* (1997) 95 A Crim R 65. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 80.

45. Vines P, 'Objections to Post-mortem Examination: Multiculturalism, psychology and legal decision-making' (2000) 7 *Journal of Law and Medicine* 422, 423. The Commission notes that the 'Guidelines for Coroners' made pursuant to s 58 of the *Coroners Act 1996* (WA) direct that a decision to overrule an objection should 'only be made in cases of homicide, suspicious deaths, suspected cases of severe and potentially dangerous infection and other exceptional cases': Guideline 8.

46. *Re Death of Simon Unchango (Jr)* (1997) 95 A Crim R 65.

47. *Ibid* 69.

48. *Ibid* 71. Such cause was found in the case *Wuridjal v Northern Territory Coroner* (2000) 11 NTLR 202 where the Court held that the genuinely held spiritual beliefs did not outweigh the need to determine the death of a young Aboriginal girl found hanging.

49. *Ibid*.

50. LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 7.

51. RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) recommendation 38.

The RCIADIC further recommended that any protocols developed in response to this recommendation be extended to apply to all Aboriginal deaths reported to the coroner.⁵² On the face of it, s 37 of the *Coroners Act 1996* (WA) appears to answer the first part of recommendation 38 by providing for a process where the deceased's senior next of kin can object to a post-mortem examination. However, as Prue Vines and Olivia McFarlane have noted, this 'blanket objection' does not oblige the coroner to consider cultural sensitivities (either in taking a decision to autopsy or in the actual conduct of the autopsy as recommended by the RCIADIC) and in any event the objection can be overruled.⁵³ Vines and McFarlane argue that a clear protocol in relation to Aboriginal deaths would be 'greatly preferable' to the current general provision for objection.⁵⁴ They further argue that such protocols should be entrenched in legislation 'to establish rights rather than expectations, rules rather than discretions'.⁵⁵

Although coronial guidelines have been put in place by the State Coroner to assist coronial staff in making decisions whether or not to order post-mortem examination, there is no specific direction that cultural, spiritual or customary law beliefs should be taken into account in the decision-making process. The guidelines make general reference to the views of the senior next of kin and also direct coroners to 'take account of any known views of any other relatives of the deceased and any person who, immediately before death, was living with the deceased' when making a decision whether or not to order a post-mortem examination.⁵⁶ It is suggested by the State Coroner that in the context of an Aboriginal deceased, this guideline requires a coroner to take into account the views of the extended family which may be considered important under Aboriginal customary law.⁵⁷ However, it must be noted that whilst these views must be taken into account if they are 'known' to the coroner, there is no requirement that coroners consult with family (other than the senior next of kin) to obtain those views. In these circumstances the effectiveness of this

guideline is heavily reliant upon the cultural awareness of the relevant coroner and his or her industry in ensuring that the views and cultural beliefs of extended family are considered.⁵⁸

Vines and McFarlane have stressed that internal administrative guidelines such as the ones relied upon in Western Australia are not acceptable because they 'may easily be changed without public knowledge'.⁵⁹ They argue for a more transparent process that is legislatively entrenched. In this regard the Commission notes that s 59 of the *Coroners Act* expressly provides that the Regulations may 'specify the matters to be taken into account when considering whether or not a post-mortem examination should be performed'. The Commission can see no reason why guidelines directing a coroner to have regard to cultural matters in making a decision to order a post-mortem examination cannot be posited in legislative form in the *Coroners Regulations 1997* (WA).

In raising this possibility the Commission notes that similar legislative directions already exist in relation to determinations about the performance of autopsies in other jurisdictions. For example, in New Zealand in determining whether to perform an autopsy the coroner must have regard to customary beliefs requiring expeditious burial or customary beliefs that consider post-mortem examination of bodies offensive.⁶⁰ In Queensland, coroners must have regard to any concerns raised by a family member or any distress which may be suffered due to cultural traditions or spiritual beliefs;⁶¹ while in the ACT, coroners must have regard to 'the desirability of minimising the causing of distress or offence to persons who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision'.⁶²

One commentator has suggested that there is not a great deal of difference between the decisions made in these jurisdictions and those without legislative

52. Ibid, recommendation 39.

53. Vines P & McFarlane O, 'Investigating to Save Lives: Coroners and Aboriginal Deaths in Custody' (2000) 4(27) *Indigenous Law Bulletin* 8, 10.

54. Ibid.

55. Ibid 13.

56. State Coroner of Western Australia, 'Guidelines for Coroners', guideline 13.

57. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronal Process', letter to the LRCWA (4 July 2005) 1.

58. The State Coroner indicates that each newly appointed magistrate (who may act as a coroner) is given a half-day induction into the processes of the Coroner's Court during which the magistrate is provided with a copy of relevant cases, such as *Unchango* (referred to above): ibid 2. There does not appear to be any specific Aboriginal cultural awareness training delivered to coronial staff or to new coroners, although it is probable that such training would be provided by the Department of Justice to new magistrates acting as coroners.

59. Vines P & McFarlane O, 'Investigating to Save Lives: Coroners and Aboriginal Deaths in Custody' (2000) 4(27) *Indigenous Law Bulletin* 8, 12.

60. *Coroners Act 1988* (NZ) s 8.

61. *Coroners Act 2003* (Qld) s 19(4).

62. *Coroners Act 1997* (ACT) s 28.

provision for objection on cultural grounds.⁶³ However, whilst the Commission is convinced that Western Australian coroners take cultural objections to autopsy very seriously (particularly in the context of Aboriginal cultural beliefs), it believes that it is nevertheless desirable to make this consideration explicit in Western Australia. If nothing else, a legislative direction to a coroner to take cultural matters into account in ordering an autopsy of an Aboriginal deceased will make it clear to the family of a deceased that their cultural beliefs have been considered in the decision-making process. Currently, a family must pursue an overruled objection to autopsy through the Supreme Court to obtain the same assurance.⁶⁴

Proposal 58

That the *Coroners Regulations 1997* (WA) be amended to include a direction that in making a decision whether or not to order a post-mortem examination on an Aboriginal deceased person, a coroner must have regard to the desirability of minimising the causing of distress or offence to relatives and extended family (including classificatory kin) of the deceased who, because of their cultural attitudes or spiritual beliefs, could reasonably be expected to be distressed or offended by the making of that decision.

Although constrained by its Terms of Reference to consideration of Aboriginal customary laws, the Commission can see no reason why the above proposal should be limited in application to Aboriginal deceased persons. The Commission applauds the State Coroner's efforts to ensure that 'the coronial process treats people equally irrespective of race, colour or creed'.⁶⁵ The Commission would therefore support a general provision of this nature if it were considered appropriate by the State Coroner.

Definition of 'Senior Next of Kin'

A pertinent observation of the coronial process made by the Aboriginal Legal Service in the Commission's consultations with them on 29 July 2003 was that the notion of next of kin was a 'whitefella construct'. As

mentioned earlier, the *Coroners Act 1996* (WA) provides certain rights to a deceased's senior next of kin, including rights to notification and objection in respect of post-mortem examination. A senior next of kin is defined in s 37(5) of the Act to include (in order of priority) a person who was living with the deceased immediately before the death and was either legally married to the deceased or over the age of 18 years and in a marriage-like relationship with the deceased (including same-sex relationships); a person who was, immediately before the death, legally married to the deceased (but not necessarily living with the deceased); a child of the deceased (over the age of 18 years); a parent of the deceased; a sibling of the deceased (over the age of 18 years); an executor or guardian; or a person nominated by the deceased to be contacted in case of emergency.

The notion of Aboriginal kinship has already been the subject of discussion in this Part in relation to tortious acts and omissions and rights of succession to deceased estates. In particular it has been shown that Aboriginal people view the concept of kinship and family far more broadly than in Western societies. The ACT, Queensland, Tasmanian and Northern Territory Coroners Acts embrace a broader concept of family, providing specifically for Aboriginal and Torres Strait Islander cultural concepts of kin.⁶⁶ Whilst the former two jurisdictions direct the coroner to consider the family's cultural attitudes and beliefs in making a decision to order post-mortem examination of a deceased, they do not extend to a family member the right to object to post-mortem examination. However, the Tasmanian and Northern Territory legislation do provide for a right of objection to autopsy to the senior next of kin, which includes in the case of an Aboriginal deceased:

[A] person who, according to the customs and tradition of the community or group to which the person belongs, is an appropriate person.⁶⁷

Such provision enhances the cultural recognition of Aboriginal customary law and would appear to answer many of the concerns of Aboriginal people communicated to the Commission during its community consultations. The Commission notes, however, that in a 1999 review of the operation of the *Coroners Act*

63. Vines P, 'Objections to Post-mortem Examination: Multiculturalism, psychology and legal decision-making' (2000) 7 *Journal of Law and Medicine* 422, 429.

64. The Commission notes the concerns expressed by coronial counsellors in a 1999 review of the *Coroners Act 1996* (WA) that 'financial reasons may prevent the "vast majority" of Western Australians from exercising their right to pursue a case if an objection [to autopsy] is overruled'. Chivell W, *Report on Review of the Coroners Act 1996* (WA) (May 1999) 34.

65. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter to the LRCWA (4 July 2005) 1.

66. *Coroners Act 1997* (ACT) s 3; *Coroners Act 2003* (Qld) sch 2; *Coroners Act 1995* (Tas) s 3; *Coroners Act 1993* (NT) s 3.

67. *Coroners Act 1995* (Tas) s 3; *Coroners Act 1993* (NT) s 3.

1996 (WA) undertaken by Wayne Chivell (the State Coroner for South Australia), the Western Australian State Coroner raised an objection to the inclusion of a provision recognising Aboriginal customary law in regard to the definition of senior next of kin. In the Coroner's opinion, such an amendment would bring uncertainty to the coronial process (presumably recognising the difficulty of locating an appropriate person under Aboriginal customary law) and perhaps result in unnecessary delays.⁶⁸ The Coroner further pointed out that 'the number of disputes in this area [was] small, and that a change to accommodate them would not compensate for the loss of certainty in a larger number of other cases'.⁶⁹ The review consequently recommended that, rather than adopting a provision similar to that existing in Tasmania or the Northern Territory,

the Attorney-General should consider amendment of section 37(5) to add a provision granting any person, or a specified class of persons, the right to apply to the State Coroner seeking an order that he or she should be regarded as the senior next of kin, having regard to the customary law of the deceased person, and granting the State Coroner a discretion to make such an order having regard to the totality of the available evidence.⁷⁰

However, it appears that the State Coroner did not support this recommendation to Parliament on the basis that such amendment would

only serve to empower an additional person as senior next of kin rather than cause a substitution. I do not consider that it would be appropriate, for example, for an Aunt to replace the Spouse of a deceased person who had lived with the deceased for many years, even if in customary law the Aunt had special powers in relation to the body ... problems only seem to arise in relation to this definition where there are family disputes. In this context I am not convinced that customary law would assist in providing a just outcome.

The present system has the benefit of being simple and clear. It is necessary to have an identified person who can exercise certain rights and be served with relevant documentation. However that person is identified, other persons who have been close to the deceased may feel a justified sense of grievance in relation to the identification of that person [as senior next of kin].⁷¹

In his response to the 1999 review, the State Coroner committed to seeking views from the then Aboriginal Justice Council and other Aboriginal organisations in this regard. The outcome of these discussions is unknown. Whilst the Commission appreciates the State Coroner's arguments against amending the definition of senior next of kin in relation to an Aboriginal deceased, it is concerned that Aboriginal customary law may not be sufficiently recognised in the present Act where there is a clear opportunity to do so. Although conflicts arising from the different understandings of kin in Western and Aboriginal cultures were reported to the Commission in relation to other areas of law, the Commission has limited submissions on this matter in regard to the coronial issues outlined in this section. The Commission would therefore like to hear from interested parties on whether there is a need to amend the definition of senior next of kin in the *Coroners Act 1996* (WA) to recognise Aboriginal customary law in the way envisaged by the 1999 review.

In respect of this invitation to submit, the Commission stresses that the senior next of kin identified in relation to coronial matters may be different to the person identified as having burial rights to the body of a deceased. Responses to this invitation to submit should be confined to the issue of whether a person claiming rights under Aboriginal customary law should be able to apply to the State Coroner to be regarded as senior next of kin for the purposes of notification, objections to autopsy and other specific rights accorded to senior next of kin under the *Coroners Act*. The issue of burial rights will be dealt with in the following section.⁷²

Invitation to Submit 11

The Commission invites submissions on whether s 35(7) of the *Coroners Act 1996* (WA) should be amended to include a provision granting any person, or a specified class of persons, the right to apply to the State Coroner seeking an order that he or she should be regarded as the senior next of kin, having regard to the customary law of the deceased person, and granting the State Coroner a discretion to make such an order having regard to the totality of the available evidence.

68. Chivell W, *Report on Review of the Coroners Act 1996* (WA) (May 1999) 23.

69. *Ibid.*

70. *Ibid.*

71. Office of the State Coroner, 'Response to Report on the Review of the Coroners Act 1996 (WA)' (30 August 1999) 3.

72. Under Western Australian law the right to dispose of a deceased's body lies with the executor of the deceased's will or the person with the highest right to administration in the case of an intestate deceased. In the majority of cases, therefore, the wishes of the spouse will prevail over the wishes

Implementation of Recommendations of the Royal Commission into Aboriginal Deaths in Custody

As mentioned earlier, the RCIADIC made 35 recommendations relating to coronial practices in respect of Aboriginal deaths in custody. Recommendations 38 and 39, which relate to cultural objections to autopsy, have already been discussed. Other recommendations of the RCIADIC included the allocation of judicial office to the State Coroner;⁷³ the notification of family of a deceased;⁷⁴ that all deaths in care, custody or detention be 'reportable' deaths and subject to mandatory inquiry;⁷⁵ and that custodial authorities be required by law to immediately notify the coroner in the event of a death in custody.⁷⁶ Each of these recommendations has been legislated in Western Australia by the *Coroners Act 1996*. Further recommendations of the RCIADIC have been implemented by guidelines made by the State Coroner pursuant to s 58 of the Act and addressed to coroners, police and custodial institutions. In fact the 1999 Chivell review found that the Act, when coupled with the guidelines, 'comprehensively implemented' the recommendations of the RCIADIC.⁷⁷ Nonetheless, the review recommended that the guidelines needed to be redrafted to properly implement a 'protocol for the conduct of coronial inquiries into deaths in custody'⁷⁸ and to address the qualifications of investigators.⁷⁹ It appears that each of these matters was addressed by the issue of new 'Guidelines for Police' immediately following the review.

Accessibility of coronial guidelines and findings

In its correspondence with the State Coroner the Commission raised the issue that, although coronial guidelines played a large part in the implementation of

the recommendations of the RCIADIC, there was no access to these guidelines 'online'. This affects the public transparency of coronial processes which, in relation to deaths in custody, is of utmost importance. The State Coroner has responded that his office has for some time sought the provision of a dedicated internet site without success. He suggested that such a site would be useful not only in providing access to information such as guidelines, procedures and protocols of the Coroner's Court, but also for enabling immediate access to coroners' findings. The Commission believes that a dedicated internet site for the Coroner's Court of Western Australia should be established at the earliest opportunity.

Proposal 59

That the Department of Justice establish, at the earliest opportunity, a dedicated internet site for the Coroner's Court of Western Australia to enable public access to coronial guidelines, procedures, protocols and findings.

Recommendations of the Chivell Review Relating to Aboriginal People and the Coronial Process

Transport of bodies

Apart from the matters relating to Aboriginal deaths in custody referred to above, there were several other matters raised by the 1999 Chivell review of the operation of the Coroners Act that relate to Aboriginal people in the coronial process. For example, there was a need expressed by Aboriginal representatives for protocols to be established to deal with the removal and transportation of bodies to Perth for post-mortem examination. It was said that the removal of bodies

of the deceased's family, even where the deceased is Aboriginal and the family claim rights under customary law. The coroner must release the body in accordance with legal entitlements. There is direct Western Australian authority which illustrates that where a coroner releases a body otherwise, the court will uphold the claim for the body to be transferred to the person with the legal entitlement. See *Re Boothman; ex parte Trigg* (Unreported, Supreme Court of Western Australia, Lib No BC 990031, Owen J, 27 January 1999).

73. Recommendation 9. In Western Australia the Office of the State Coroner is the equivalent of the Office of Chief Stipendiary Magistrate: *Coroners Act 1996* (WA) s 6.

74. Recommendation 19. See *Coroners Act 1996* (WA) s 20.

75. Recommendations 6 & 11. See *Coroners Act 1996* (WA) s 22.

76. Recommendation 10. See *Coroners Act 1996* (WA) s 17. The Western Australian Act goes further to make it an offence if a death is not reported immediately: s 17(5).

77. Chivell W, *Report on Review of the Coroners Act 1996* (WA) (May 1999) 1.

78. Ibid 15. As recommended in recommendation 8 of the RCIADIC report. It is noted that s 25 of the *Coroners Act 1996* (WA) implements a basic protocol by directing that a coroner comment on the quality of supervision, treatment and care of the person who had died in custody and that the 'Guidelines for Coroners' detail steps to be taken in conducting inquests; however, these were not considered by Chivell to be sufficient implementation of recommendation 8.

79. Ibid 17. As recommended in recommendation 34 of the RCIADIC report.

'often interrupts the grieving process and disturbs Aboriginal funerary customs'.⁸⁰ In consultation with the State Coroner, Chivell recommended that a direction be made to regional coroners to ensure that local protocols be developed in relation to the transport of bodies of deceased persons from Aboriginal communities within their regions.⁸¹ The recommendation has since been implemented procedurally.

Although it is clear from the Commission's consultations with Aboriginal communities that issues still exist with the transport of bodies, it was not a matter that was raised often and when it was raised it was generally in relation to a spouse overriding the wishes of a community in regard to returning a body for burial.⁸² In Kalgoorlie it was reported that families were required to bear the considerable cost of retrieving a body from Perth when it was sent there for the purposes of coronial investigation.⁸³ The Commission has raised this issue with the State Coroner's office and has been informed that the coroner bears the responsibility and costs of returning a body to the place of death if it is removed for coronial purposes. Further, the Commission was informed that, if it is preferred and if costs are equivalent, the coroner will organise transport to the place of burial.⁸⁴ It must, however, be noted that there is no obligation upon the coroner to repatriate a body to the deceased's homeland if the death occurred in another place. For example, if a Kimberley person died under suspicious circumstances in Perth, the coroner would take immediate control of the body but the family would be responsible for the costs involved in transporting the body of the deceased back to the Kimberley once it was released for burial.

Effect of cultural objections to autopsy on SIDS research

The Chivell review suggested that cultural objections by Aboriginal people to autopsy might conceivably skew research into sudden infant death syndrome (SIDS). It was said that the rate of sudden infant death was higher among Aboriginal infants than in the general community but that post-mortem examination is a prerequisite for diagnosis of the condition.⁸⁵ A concern was expressed that if SIDS deaths were unreported because of coronial acceptance of Aboriginal cultural objections to post-mortem, it might be difficult to obtain funding to deal with the problem in Aboriginal communities. It was recommended that the State Coroner write to the Minister for Health explaining the problem and recommending that the potential of affected data be borne in mind when making decisions based on SIDS data. This recommendation has been effectively implemented.

Coronial Ethics Committee

The Chivell review also recommended that guidelines be issued in relation to the establishment and functions of the Coronial Ethics Committee pursuant to s 58(2)(d) of the Act. Guidelines subsequently drafted by the State Coroner recommended that at least one member of the committee should be an Aboriginal person. Unfortunately, it appears that no Aboriginal person is currently a member of the committee, although the Commission has been advised that ongoing approaches are being made by the State Coroner to suitable persons.⁸⁶

80. Ibid 18.

81. Ibid 19.

82. See for instance LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.

83. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 28.

84. Email received from Dave Dent, Registry Manager, Coroner's Court (1 July 2005).

85. Chivell W, *Report on Review of the Coroners Act 1996 (WA)* (May 1999) 32.

86. State Coroner of Western Australia, 'Recognition of the Rights of Aboriginal People in the Coronial Process', letter to the LRCWA (4 July 2005) 4.

Funerary Practices

Aboriginal Funerary Rites

The traditional position

In traditional Aboriginal societies a death was more than simply a family affair: it would affect everyone in the group.¹ Usually close relatives would be taken into immediate mourning (which would often involve loud wailing and the self-infliction of wounds), while non-family or distant male relatives would be dispatched to send news of the death to neighbouring groups.² Within a short time, the peoples of the area would converge on the camp where the death occurred to pay their respects and to assist with the funerary rites.³ In some cases non-family males and male members of distant groups would perform all funerary rites;⁴ in other cases the classificatory brothers of a deceased would be called upon to perform certain tasks such as carrying the body to its final resting place.⁵

Although burial was the most common traditional mortuary practice in Aboriginal Australia,⁶ there were various other customary ways of dealing with the body of a deceased, including 'exposure on a platform or tree, desiccation, or mummification; cremation; placing in a hollow tree; use of what could be called coffins; and burial cannibalism'.⁷ In many cases everything associated with the deceased was 'destroyed, avoided

or purified'.⁸ This included deserting the deceased's camp and grave, and burning or burying the deceased's belongings.⁹ Following these funerary rites, people closely associated with the deceased (in particular widows) would observe certain taboos relating to food, remarriage and silence.¹⁰ The entire group would usually observe the taboo against speaking the name of a dead person and this taboo might stay in place for some years following a death.¹¹

Traditional Aboriginal funerary rites would often vary according to the social significance of the deceased: the higher the status of the deceased, the more complex and lengthy the funerary rite.¹² Social significance may be achieved through 'age, knowledge, skill, natural leadership and physical fitness'.¹³ Usually, the fully initiated men of a group would have the highest status and infants would have the lowest status, with children, women and older men in between.¹⁴ Funerary rites might also differ depending on the cause of death, the need for an inquest and the pressure for revenge.¹⁵ The ultimate purpose of traditional funerary rites was to dissociate the spirit from the body so that it would be permanently removed to its final resting place and not 'worry' the living.¹⁶ Aboriginal people also believed that the spirit's wellbeing in the afterlife depended on the performance of appropriate funerary and mortuary rituals. As Berndt and Berndt explain, discrimination in

1. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 454.
2. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 84.
3. Ibid.
4. Ibid. Speaking of traditional practices of the Mardudjara peoples of the west Gibson Desert region of Western Australia.
5. Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102. Speaking of traditional practices of the Gooniyandi peoples in the southern-central Kimberley region of Western Australia.
6. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 461.
7. Ibid 459.
8. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 341–43.
9. Ibid 343. See also Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 84.
10. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 456–57. Tonkinson reports that taboos against eating certain foods (generally meats of marsupials and mammals) may stay in place for as long as two years: Tonkinson, *ibid* 85. There are also taboos that prohibit groups from going near a person's burial place or place of death: Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 104.
11. Berndt & Berndt, *ibid* 456. Tonkinson reports that words that sound similar to a dead person's name would often be completely dropped from the language and person's carrying the same or similar sounding name would no longer be called by that name. Tonkinson, *ibid*.
12. Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 355–56.
13. Ibid.
14. Ibid 356.
15. Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life past and present* (Canberra: Aboriginal Studies Press, 5th ed., 1999) 478–79.
16. See, Berndt & Berndt, *ibid* 453; Elkin AP, *The Australian Aborigines* (Sydney: Angus & Robertson, 4th ed., 1974) 358–60; Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 83.

the afterlife depends on 'items of ritual action such as whether the dead person shows the appropriate physical signs of having undergone certain rites, or whether the mourners have attended properly to the mortuary procedures'.¹⁷

The contemporary position

Death is a regrettably frequent event in contemporary Aboriginal society and the funerary rites that are customarily performed upon death remain important to Aboriginal culture. In rural and remote Australia, obligations associated with death extend widely through family and regional networks.¹⁸ For example, mourning periods ('sorry time') and taboos are still widely observed in Aboriginal communities, in particular the taboo that prohibits a deceased's name being spoken. It also remains an important part of Aboriginal culture to attend funerals and associated ceremonies even though it may be necessary to travel long distances and the deceased may be only a distant relative.¹⁹

Although cultural obligations surrounding death remain strong, it is clear that Aboriginal customary law has adapted in many cases to take account of Western mortuary practices and laws relating to the disposal of bodies.²⁰ It is unlikely, for instance, that many Aboriginal groups would still employ tree platforms or burial cannibalism as part of their mortuary rituals. In most cases the body of an Aboriginal deceased would be dealt with by a funeral director and burial would take place in a recognised cemetery.

The extent to which traditional mortuary rites involving the body of a deceased are still practised in Western Australia is not known.²¹ It has been observed by

commentators that rituals not associated with preparation of the body for final disposal (such as the burning of houses following a death and the destruction of belongings of a deceased) are less likely to occur in contemporary society where many Aboriginal people live in permanent dwellings and perhaps have more possessions.²² However, the Commission's consultations in Wiluna revealed that these rituals are still observed, albeit in modified form. For example, it was reported that families will often move out of houses for the mourning period following a death and will deal with valuable possessions of a deceased by sending them to another Aboriginal community.²³ This suggests that the customary laws surrounding Aboriginal funerary practices remain strong in some parts of Western Australia.

Burial Rights Under Aboriginal Customary Law

Place of burial

Being able to die and be buried in one's traditional homelands was very important in traditional Aboriginal societies.²⁴ As Tonkinson explains, 'old people who feel that their lives may be coming to an end prefer to die close to their birthplace so that their spirit will be spared a long journey back to its original home'.²⁵ Although many Aboriginal people believe that a deceased's body should be returned to the land from which it originated, this is not always the case. Sometimes Aboriginal people prefer to be buried in the place they grew up or where they lived prior to their death.²⁶ Nonetheless, there appears to be widespread acceptance of customary laws dictating burial of a deceased in his or her homeland. The Commission's consultations with

17. Berndt & Berndt, *ibid* 486.

18. Avery J, 'Rights to Mortuary Rites' (2002) 5(14) *Indigenous Law Bulletin* 15, 15.

19. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 8.

20. For example, the Gooniyandi of the south-central Kimberley region apparently no longer practise traditional rites and have not done so for many years. Instead, the deceased's body comes under the control of white institutions. See Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 102.

21. It is conceivable that some Aboriginal groups still perform modified rites upon death that may involve ceremonial dealing with the body of a deceased. Although the Commission did not hear of any mortuary rituals being practised in respect of a deceased's body, Bohemia and McGregor report that traditional inquests (without full rites, such as the tree platform, but presumably involving the body) are still practised by some desert peoples residing in Fitzroy Crossing. See Bohemia J & McGregor W, 'Death Practices in the North West of Australia' (1991) 15(1) *Aboriginal History* 86, 104. Certainly some Aboriginal peoples of the Northern Territory are known to practise 'modified traditional mortuary rituals' involving the deceased's body. See Avery J, 'Rights to Mortuary Rites' (2002) 5(14) *Indigenous Law Bulletin* 15, 15.

22. Vines P, 'When Cultures Clash: Aborigines and inheritance in Australia' in Miller G (ed), *Frontiers of Family Law* (Dartmouth: Ashgate, 2003) 98, 103.

23. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.

24. Byrnes J, 'A Comparison of Aboriginal and Non-Aboriginal Values' (2000) 3 *Dissent* 6, 10.

25. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 104. Piddington has observed in respect of the Karadjeri group of the north-west that a person always 'wishes to return to his horde territory to die, for it is to this land that he is bound by material, social and religious ties': Piddington R, *An Introduction to Social Anthropology* (Edinburgh: Oliver & Boyd, vol 1, 1950) 289. Whilst in *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib No 970594, Bredmeyer M, 7 November 1997) burial in one's country was said to be the custom of the Yamatji peoples of the Carnarvon area.

26. QLRC, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper (June 2004) [5.5].

Aboriginal communities in Western Australia revealed that burial in one's place of birth or 'country' was, and remains, the custom for the Aboriginal peoples of Broome,²⁷ Wuggubun,²⁸ Wiluna,²⁹ Meekatharra,³⁰ Geraldton³¹ and Fitzroy Crossing.³² The custom of burial in one's country was also raised at the consultation in metropolitan Mirrabooka, which illustrates that some urban Aboriginal people also strive to observe customary laws regarding place of burial.³³

Right to dispose of a deceased's body

Under Aboriginal customary law, the right to dispose of a body usually rests with the family or blood relatives of a deceased. The family's wishes will therefore prevail over those of the deceased's spouse.³⁴ This understanding of Aboriginal customary law appears to be common throughout Western Australia and featured in many of the Commission's discussions with Aboriginal communities. Nevertheless, information gathered at the Commission's consultations and case law from many Australian jurisdictions indicate that disputes regularly arise between family members and a deceased's spouse in relation to the right to bury an Aboriginal deceased. This matter was one of great concern to many Aboriginal people interviewed by the Commission who felt that non-Aboriginal partners or Aboriginal 'wrong-way' skin partners of an Aboriginal deceased did not always understand or respect the family's customary law right to dispose of the deceased's body.³⁵

Aboriginal Funerary Rites and the Laws of Western Australia

Preparation of the body for final disposal

Perhaps in recognition that Australia is home to many cultures and religions, laws relating to funerary and mortuary rites have the potential to accommodate diverse cultural and religious beliefs, customs and practices. Although full Aboriginal customary law funerary and mortuary rites appear to be rarely practised now, there is scope for the performance of certain customary rites upon death, even those involving preparation of the deceased's bodily remains for final disposal.³⁶ For example, although many families will choose to use the services of a funeral director to prepare a body for burial and to make the various arrangements for funerals, there is no law that requires families to engage such services.³⁷ The *Cemeteries Act 1986* (WA), which governs burial of a deceased,³⁸ the conduct of funerals and the licensing of funeral directors, also provides for persons to apply for a 'single funeral permit'.³⁹ Upon meeting certain conditions, such as supply of a death certificate,⁴⁰ payment of a prescribed fee,⁴¹ provision of a suitable coffin for burial⁴² and availability of suitable transport for the coffin⁴³ to the relevant cemetery, a person may obtain a permit to perform the appropriate arrangements for the final disposal of the deceased⁴⁴ and to conduct the funeral.⁴⁵

27. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 25. It should be noted that this was not a standard question raised with Aboriginal communities during the Commission's consultations. Aboriginal participants were free to discuss anything that concerned them about recognition of Aboriginal customary law.
28. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 39.
29. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.
30. LRCWA, Project No 94, *Thematic Summaries of Consultations – Meekatharra*, 28 August 2003, 30.
31. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18.
32. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 April 2004, 44.
33. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 13.
34. *In the Matter of the Estate of Bellotti* (Unreported, Supreme Court of Western Australia, Lib No 970594, Bredmeyer M, 7 November 1997).
35. See, for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 April 2004, 44; *Cosmo Newbery*, 6 April 2003, 21; *Pilbara*, 6–11 April 2003, 19; *Wiluna*, 27 August 2003, 26; *Meekatharra*, 28 August 2003, 30; *Bunbury*, 28–29 October 2003, 9.
36. Section 4 of the *Births, Deaths and Marriages Registration Act 1998* (WA) defines the lawful disposal of human remains as: cremation; burial (including burial at sea); placing the remains in a mausoleum or other permanent resting place; and removal of the remains from the state.
37. The Department for Community Development (WA) provides financial assistance for funerals for those in need. Upon meeting stringent criteria based on a 'means test' of the applicant and relevant family members, a basic funeral service will be provided by a government contracted funeral director. Further information can be found at <http://community.wa.gov.au/Resources/FinancialHelp/Getting_Help_with_Funerals.htm>.
38. The cremation of dead bodies is governed by the *Cremation Act 1929* (WA).
39. *Cemeteries Act 1986* (WA) s 20.
40. Where a body is to be cremated a further permit signed by a medical referee pursuant to the *Cremation Act 1929* (WA) is required.
41. At the time of writing the fee for a single funeral permit was \$130 in metropolitan Perth. In other places in Western Australia the prescribed fee may be lower.
42. Provision of a coffin from a recognised supplier is considered enough to satisfy this requirement. In circumstances where a family wishes to supply their own coffin, the coffin will be inspected by the Metropolitan Cemeteries Board or other government authority (such as the local council responsible for governing a cemetery in a rural area or a relevant regional cemeteries board) to ensure that it meets relevant size and strength requirements.
43. A hearse is not required – suitable transport may be a station wagon or similar vehicle. Usually the vehicle nominated for transport of the coffin will be inspected by the relevant cemeteries board or local council.
44. Arrangements would include such things as obtaining the necessary permits, securing a grant of burial from the relevant cemetery authority and arranging the memorial service or viewing.
45. The *Cemeteries Act 1986* (WA) s 14 governs the conduct of funerals in cemeteries and permits the holder of a single funeral permit to conduct a funeral.

The Commission can see no obstacle ... that would prevent the performance of Aboriginal customary law funerary rites which did not interfere with the bodily integrity of the deceased.

In these instances a body will usually be kept in a morgue or hospital facility until the date of burial.

In most cases where a family does engage the services of a licensed funeral director, the body can be prepared according to traditional customs. A number of religions and cultures require certain rituals (such as wrapping the body in cloth or applying certain oils)⁴⁶ to be carried out in preparation of a body for burial. These rituals will generally be performed by the funeral director although in some instances they may be observed or carried out by family members or religious authorities on the funeral director's premises. A body may also be released by the funeral director for viewing at private premises or for the conduct of certain rituals in preparation for burial; however, in these cases embalming of the body is encouraged to insure against the spread of infection or further degeneration of the body.⁴⁷ The Commission can see no obstacle in the current law that would prevent the performance of Aboriginal customary law funerary rites which did not interfere with the bodily integrity of the deceased. However, it should be noted that the performance of rituals in preparation for burial will generally be at the discretion of the funeral director involved.

Performance of graveside ceremonies

In most cases, traditional ceremonies associated with death will take place in special 'sorry grounds' or 'sorry camps' within the deceased's country;⁴⁸ however, some form of graveside ceremony may often also be held for an Aboriginal deceased. Although the by-laws or rules relating to individual cemeteries may feasibly contain regulations regarding the types of graveside ceremony permitted in that cemetery, s 15 of the *Cemeteries*

Act 1986 (WA) prohibits interference by cemetery authorities, whether direct or indirect,

with the performance of any religious ceremony at a funeral, except in the case of a ceremony that is offensive having regard to the standards of decency and propriety that are generally acceptable in the community.

This prohibition would suggest that many different types of graveside ceremony are accepted in Western Australian cemeteries and that Aboriginal customary law funerary rites that do not offend s 15 would, if desired, be able to be performed graveside. Permitting families to fill in the grave following burial is a common request that is invariably accommodated in respect of graveside ceremonies for an Aboriginal deceased.⁴⁹

Aboriginal Burial Rights and the Laws of Western Australia

Place of burial

In consultations with Aboriginal communities in Geraldton, the Commission was informed that adherence to customary law might sometimes require a deceased to be buried in a place other than a designated cemetery.⁵⁰ It was thought by attendees that such burial was not possible in Western Australia. In fact, s 12 of the *Cemeteries Act 1986* (WA) provides that:

The Minister may authorise the burial of a dead body in a place other than a cemetery where —

- (a) the burial is to take place on land that is reserved under the *Land Administration Act 1997* for the purpose of burials but is not a cemetery; or
- (b) the Minister is satisfied that the burial is to take place in an area that is visibly set apart for and distinguishable as a burial place.

46. For example, in Islamic tradition in preparation of a body for burial 'the body is taken home or to a mosque where it is ritually washed and wrapped in calico'. The body should only be handled by persons of the same gender as the deceased. See Babacan H & Obst P, *Death, Dying and Religion: An examination of non-Christian beliefs and practices* (Brisbane: Ethnic Communities Council of Queensland Ltd, 1998). See also QLRC, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper No 58 (June 2004) 26.

47. Information provided by the Funeral Directors' Association of Western Australia.

48. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 26.

49. Information provided by the Funeral Directors' Association of Western Australia.

50. LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 18–19.

It would appear, therefore, that the legislative means exist to create a community cemetery or burial grounds in circumstances where an Aboriginal community or individual owned or held land in trust and an area of that land was able to be designated for the purpose of burials.

Although this may assist communities with discrete lands to accommodate Aboriginal customary law in respect of the place of burial, it may do little for urban or regional Aboriginal people who are unable to satisfy the requirements of s 12. The Commission has, however, heard of instances where alternatives have been developed to substitute for burial in one's own country and to assist the spirit of the deceased to find its way to its homelands. For example, in Broome the Commission was told that soil from a deceased's country was commonly used to mix with the soil from the gravesite where burial in a deceased's homelands was not possible.⁵¹ This might be in circumstances where no designated cemetery exists in that country or where there is family dispute about the place of burial resolved in favour of the spouse.

Right to dispose of a deceased's body

It was mentioned earlier that disputes over rights to dispose of a deceased's body are not uncommon in contemporary Aboriginal society. Often conflicts result from the wishes of family to bury a deceased family member in their traditional homelands pursuant to the relevant customary laws and the competing wishes of the deceased's spouse to have his or her loved one buried elsewhere.⁵² In Australia there is little legislative guidance on the question of who has the right to determine the manner and place of burial of a deceased. Instead, burial conflicts are usually resolved through the application of principles developed by the common law.⁵³ Heather Conway has noted that:

When confronted with family burial conflicts, courts have resolved them by determining who has the legal

right to possession of a corpse and is thus entitled to determine the manner and place of burial. Judges have consistently rejected arguments based on religious or cultural values as well as the competing emotions and wishes of the living, as irrelevant in this context.⁵⁴

The relevant principles applicable to burial conflicts in Western Australia may be stated as follows:

- (1) When a person dies testate (having left a valid will), the deceased's executor has the right to arrange the burial of the deceased. The wishes of the deceased's executor will therefore prevail over the wishes of the deceased's family and this priority will not be displaced by a more meritorious claim.⁵⁵
- (2) Where a person dies intestate (without having left a valid will), the right to bury the deceased will lie with the person who has the highest entitlement to the deceased's estate (and therefore the right to administer the deceased's estate) under the *Administration Act 1903* (WA). The highest entitlement lies with the surviving spouse (or alternatively, the deceased's de facto partner) followed by the children of the deceased, the deceased's parents, the deceased's siblings, then other specified family members.⁵⁶
- (3) The right of the surviving spouse or de facto partner will be preferred to the right of children.⁵⁷
- (4) Where a de facto partner is not living with the deceased at the time of death the person with the next highest entitlement to apply for letters of administration in respect of the deceased's estate will have the right to dispose of the body.⁵⁸
- (5) Where two people have an equally ranking entitlement to administration—for example, two parents in respect of a deceased child—the right to bury will be decided according to the practicalities of burial without unreasonable delay.⁵⁹ Relevant considerations may include 'where the

51. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 25.

52. Typically the spouse seeks burial in the place of their joint residence prior to the death. Reasons for such location are generally expressed to allow visits to the grave by the spouse or by the deceased's children.

53. Atherton R, 'Who owns your body?' (2003) 77 *Australian Law Journal* 178, 184.

54. Conway H, 'Dead, but not Buried: Bodies, burial and family conflicts' (2003) 23(3) *Legal Studies* 423, 430.

55. *Re Boothman; ex parte Trigg* (Unreported, Supreme Court of Western Australia, Lib No BC 990031, Owen J, 27 January 1999).

56. See *Administration Act 1903* (WA) ss 14, 15. The de facto partner must have been living with the deceased for two years immediately preceding the death. For further statement of the principle, see *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–94.

57. *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–94.

58. In *Burnes v Richard* (Unreported, Supreme Court of New South Wales, Cohen J, 6 October 1993) it was decided that although the relationship between the deceased and her former de facto husband had endured for 17 years, the de facto had no right to disposal of the body of the deceased because the relationship had ended shortly before the deceased's death. Accordingly, the deceased's daughter won the right to dispose of the body. However, 'if the de facto relationship between the deceased and the defendant had existed at the date of death, the defendant would have been entitled under the relevant legislation to seek letters of administration with a consequent right to the body for the purposes of burial': see Editorial, 'Who Can Insist on Where to Bury a Body?' (1994) 68(1) *Australian Law Journal* 67. See also *Jones v Dodd* [1999] SASC 125.

59. *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–94.

deceased resided prior to death, the length of the deceased's residence in that area ... convenience of family members in visiting the body of the deceased [and] whether the deceased left any directions in relation to the disposal of his or her body'.⁶⁰

- (6) Where the deceased dies intestate and there is no estate to administer, regard should be had to the cultural and spiritual values of the deceased in determining who has the right to dispose of the deceased's body.⁶¹
- (7) The person with the right to bury the deceased is expected to consult with other stakeholders, but is not legally obliged to do so.⁶²
- (8) Although a deceased's signed burial instructions should (where possible)⁶³ be followed, such directions are not legally binding upon the executor of a will, the administrator of a deceased estate or a court in deciding who has the right to disposal of the deceased's body.⁶⁴ In contrast, it is the executor's or administrator's statutory duty to ensure that all reasonable endeavours are made to carry out the wishes of a deceased where a deceased has left written and signed instructions to cremate his or her body.⁶⁵

According to the Commission's consultations with Aboriginal communities, the second stated principle appears to cause the most problems for Aboriginal people in Western Australia wishing to observe their customary laws. The problem is illustrated in a number of Australian cases, typically involving the surviving spouse or de facto partner of the deceased and members of the deceased's Aboriginal family. For example, in *In the Matter of the Estate of Bellotti*⁶⁶

the deceased died in Perth leaving a widow (of Ngoongah Aboriginal descent) and six children. The siblings of the deceased (who were of Yamatji Aboriginal descent) sought an injunction to stop the deceased's widow from burying the deceased in Perth because, according to their customary law, the deceased's relatives have a higher right to dispose of a family member's body than the deceased's spouse. During argument, the Court heard compelling cultural evidence that it was very important under Yamatji law for the deceased to be buried in his homeland in the Carnarvon area.⁶⁷ Notwithstanding this evidence, the Court held that the application of the highest entitlement principle dictated that the deceased's widow had the right to bury the deceased.⁶⁸

Can recognition of Aboriginal customary law in relation to burial matters be improved?

In *Jones v Dodd*,⁶⁹ Perry J observed that the highest entitlement principle takes on an 'air of unreality' in circumstances where 'there is no estate and where there is no likelihood of any application for a grant of administration in intestacy ever being made'.⁷⁰ In Perry J's opinion (with which Millhouse and Nyland JJ agreed), the proper approach to be taken in cases where there is no estate

is to have regard to the practical circumstances, which will vary considerably between cases, and the need to have regard to the sensitivity of the feelings of the various relatives and others who might have a claim to bury the deceased, bearing in mind also any religious, cultural or spiritual matters which might touch upon the question.⁷¹

60. QLRC, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper No 58 (June 2004) 37–38. See also *Calma v Sesar* 106 FLR 446 where there was a burial dispute between both Aboriginal parents of a deceased born in Port Hedland in Western Australia. The mother made arrangements for a Roman Catholic burial in Darwin where the deceased had been killed whilst the deceased's father made arrangements for burial in the deceased's Aboriginal homelands. Because an apparently equal right to administration existed, the Court decided on the basis of practicalities, including the need for expeditious burial. The Court therefore held in favour of the mother because the deceased's body was in Darwin and suitable arrangements had been made for burial there.

61. *Jones v Dodd* [1999] SASC 125.

62. *Smith v Tamworth City Council* (1997) 41 NSWLR 680, 693–94.

63. Those that argue for the burial directions of the deceased to be upheld also note that in some cases carrying out these instructions may be impossible. Heather Conway notes that 'individual autonomy may need to be restricted in the public interest, and judges would almost certainly have to impose some form of limitation to curb the whims and idiosyncrasies of more eccentric testators'. See Conway H, 'Dead, but not Buried: Bodies, burial and family conflicts' (2003) 23(3) *Legal Studies* 423, 434.

64. The principle that a person cannot, by will, dispose of his own body is well established. See: *Williams v Williams* (1882) 20 Ch D 659. See also Conway, *ibid* 430–34.

65. *Cremation Act 1929* (WA) s 13. It should be noted that cremation was a customary practice that was traditionally confined to the eastern half of the continent. According to the Funeral Directors' Association of Western Australia, very few Aboriginal people in Western Australia today choose to be cremated.

66. (Unreported, Supreme Court of Western Australia, Lib No 970594, Bredmeyer M, 7 November 1997).

67. The Court was presented with a petition signed by 96 members of the deceased's community.

68. See also *Dodd v Jones* [1999] SASC 458; *Dow v Hoskins* [2003] VSC 206.

69. *Jones v Dodd* [1999] SASC 125.

70. *Ibid* [50].

71. *Ibid* [51].

As discussed in the succession section of this paper, the majority of Aboriginal people die intestate and, even though the Public Trustee is required by law to administer the estate of an intestate Aboriginal deceased, many estates do not come to the Public Trustee's attention. In some cases this will be because there is no estate to administer; in other cases the release of finances to a member of the deceased's family under s 139 of the *Administration Act 1903* (WA) will be enough to dispose of the entire estate. In a great deal of cases, therefore, Perry J's proposition that burial disputes should be resolved by taking into account relevant cultural and religious factors would seem to apply. However, this approach does not appear to have attracted much judicial support to date.⁷²

Conway has observed that 'changing social trends resulting in fragmentation of the traditional family unit and increasingly diverse close personal relationships, combined with variations in religious and cultural practices, suggest there is every likelihood that the number of burial conflicts will increase'.⁷³ In view of the probability of increased disputes over burial and the absence of broad judicial support of Perry J's proposition, it is incumbent upon the Commission to ask whether the applicable law in resolving a burial dispute in relation to an Aboriginal deceased pays sufficient regard to Aboriginal customary law. Because the right to dispose of a deceased's body follows the order of entitlement set down in the intestacy provisions of the *Administration Act 1903* (WA), it suffers from the same problems identified above in relation to succession. That is, the law follows non-Aboriginal notions of family which 'creates a serious mismatch between the legislative scheme and Aboriginal cultural expectations'.⁷⁴ Whilst the Commission's proposed amendments to Western Australia's succession laws will recognise traditional Aboriginal marriages and provide certain succession rights to classificatory kin, these amendments will not award family members higher entitlements than a spouse to administration of the estate (and therefore right to dispose of the body) of an Aboriginal deceased.



Notwithstanding the apparent unwillingness of Australian courts to consider cultural or religious factors in determining burial disputes, there are various reasons for arguing against the introduction of legislation directing courts to consider Aboriginal customary law in relation to burial disputes over an Aboriginal deceased. First, the wishes of non-traditional Aboriginals may be overridden by the wishes of traditional family members. Second, the enactment of legislation may not only delay burial in the case of a dispute (because evidence of cultural factors would be required), but there may also be an increase in litigation.⁷⁵ Third, the current system 'promotes judicial expediency and ensures that family disputes [about burial rights] can take place within a short space of time'.⁷⁶ These benefits should not be revoked without justifiable cause.

It is useful to consider how other jurisdictions have responded to the matter. In the United Kingdom, Article 9 of the *Human Rights Act 1998* (UK) provides recognition and protection of cultural identity 'as well as upholding freedom of religion, and may provide a basis for family members to challenge funeral arrangements made by the person with legal responsibility for the burial'.⁷⁷ In Canada there are legislative provisions, distinct from the entitlement to administer an intestate estate, which set out the order of priority of persons who have the duty to bury the deceased.⁷⁸ However, the Queensland Law Reform Commission (QLRC) has commented that it may not

72. Conway H, 'Dead, but not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 442. But note the comments of Cummins J in *Dow v Hoskins* [2003] VSC 206, [43] where his Honour approved of Perry J's approach although ultimately finding in favour of the de facto spouse.

73. *Ibid* 452.

74. Vines P, 'Wills as Shields and Spears: The failure of intestacy laws and the need for wills for customary law purposes in Australia' (2001) 5(13) *Indigenous Law Bulletin* 16, 16.

75. Conway H, 'Dead, but not Buried: Bodies, burial and family conflicts' (2003) 23 *Legal Studies* 423, 439.

76. *Ibid* 449.

77. *Ibid*.

78. However, it should be noted that this legislation provides for roughly the same order of entitlement as would apply under Western Australian laws. See QLRC, *Review of the Law in Relation to the Final Disposal of a Dead Body*, Information Paper No 58 (June 2004) 41.

be appropriate to enact such provisions in Australia, because according to traditional Aboriginal custom:

[D]ecisions in relation to the disposal of a dead body are the collective responsibility of the family and kin of the deceased. Collective decision-making may be hindered by the placement of a statutory right to dispose of a dead body in one person.⁷⁹

Finally, in the United States, the courts have upheld the deceased's testamentary dispositions as to disposal of the deceased's bodily remains.⁸⁰ Whilst this position has important benefits, particularly in regard to enhancing testamentary freedom and ensuring the wishes of the deceased are observed, it has apparently resulted in a significant increase in litigation.⁸¹ Moreover, it is not helpful in resolving burial disputes where the deceased has not left a will or other signed instructions.

It is the Commission's opinion that although the principles numbered (1)–(8) above may limit the court's ability to take into account cultural factors such as Aboriginal customary law, it would be impractical to resolve burial disputes through considering the competing customs and beliefs of the deceased's family members. Indeed, as Conway has noted, '[c]ourts would be forced to make value judgments in situations where uncompromising attitudes, combined with possibly conflicting accounts of the state of familial relations given at a time of intense grief and emotional pressure, made the true state of such relationships difficult to discern'.⁸² In these circumstances, courts have commented that the only course that is feasibly open to them is to decide the matter according to the law; that is, that the person entitled to administer the estate has the right to conduct the funeral.⁸³

Some commentators have argued that because of the difficulty faced by courts in dealing with burial matters expeditiously, it is incumbent upon Parliament to legislate an order of priority to be applied by the courts.⁸⁴ Essentially, however, this has been achieved by common law adherence to the order of entitlement under the *Administration Act 1903* (WA). The Commission is not convinced that a separate legislated order of priority would assist matters, particularly in view of the comments of the QLRC noted above. However, the Commission does accept that arguments addressed

to the appropriateness of the Supreme Court as a forum for the determination of burial disputes do have some merit. In Western Australia such disputes may be waged over very long distances and are commonly between a metropolitan-based party and a party based in a rural or remote area. Since these matters must be decided expeditiously to ensure that the bodily integrity of the deceased is preserved for burial, a determination will usually necessitate the remote party to travel to Perth to be heard. There is also the issue of costs of proceedings which, at least in relation to the family (who have a lesser right to administration of the estate than the spouse), will not be borne by the estate.

The Commission finds the problem of disputes over burial rights to be one that is extremely difficult to resolve. It is a fact that this is one area where there can be no compromise and where the competing claims of spouses and families are both often meritorious. Having regard to the discussion above, the Commission invites further submissions on this matter.

Invitation to Submit 12

The Commission invites submissions on:

- Whether cultural and spiritual beliefs genuinely held under Aboriginal customary law should be considered by the court where there is a dispute in relation to the disposal of a body of an Aboriginal deceased. And if so, what significance should be attached to such cultural and spiritual beliefs?
- What would be the appropriate protocol to apply in cases where there are genuinely held but competing cultural and spiritual beliefs?
- What, if any, significance should be placed on the deceased's wishes regarding burial if embodied in a signed document (not necessarily a will)?
- Whether the Supreme Court of Western Australia is the appropriate forum for the determination of burial disputes and, if not, what would be the appropriate forum?

79. Ibid 43.

80. Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 408–09.

81. Particularly where the instructions are not embodied in a will. Ibid 409.

82. Conway H, 'Dead, but not Buried: Bodies, burial and family conflicts' (2003) 23(3) *Legal Studies* 423, 436.

83. *Holtham v Arnold* (1986) BMLR 123,125; *Meier v Bell* (Unreported, Supreme Court of Victoria, Ashley J, 3 March 1997) 5.

84. Griggs L & Mackie K, 'Burial Rights: The contemporary Australian position' (2000) 7 *Journal of Law and Medicine* 404, 414.

Indigenous Cultural and Intellectual Property Rights

Over the past twenty years, Indigenous peoples have grown acutely aware of the great medical, scientific and commercial value of their knowledge of plants, animals and ecosystems. Indigenous peoples have also attracted growing public interest in their arts and cultures, and this has greatly increased the worldwide trade in indigenous peoples' artistic works. Global trade and investment in the arts and knowledge of indigenous peoples has grown millions of dollars per year. Yet most indigenous people live in extreme poverty, and their languages and cultures continue to disappear at an alarming rate. Also, in most parts of the world, large-scale extractive projects, industrialisation, and settlements continue to destroy the ecosystems upon which indigenous peoples depend, and in which they have developed their specific forms of knowledge.¹

'Intellectual property' is a generic term for the various rights or bundles of rights which the law accords for the protection of creative effort or, more especially, for the protection of economic investment in creative effort. Australian intellectual property regimes are established and governed primarily through Commonwealth legislation. Specifically, the following laws aim to protect intellectual property in Australia:

- *Copyright Act 1968* (Cth)
- *Patents Act 1990* (Cth)
- *Trade Marks Act 1995* (Cth)
- *Designs Act 2003* (Cth)
- *Plant Breeder's Rights Act 1994* (Cth)
- *Circuit Layouts Act 1989* (Cth).

Within this framework, ownership of intellectual property is articulated as a right to 'prevent others from using or copying the [author's and/or owner's] creation without permission'.² Unfortunately, as Terri Janke and Robynne Quiggin explain (in their background

paper to this reference), this system has tended to work against the interests of Indigenous Australians, rather than for them:

Australian intellectual property laws provide some protection for Indigenous intellectual property where Indigenous people can meet the criteria for protection. To some extent the laws can be used to protect ICIP [Indigenous cultural and intellectual property] and Indigenous Australians have used copyright in particular to protect their cultural interests. Despite this, intellectual property laws have limitations in recognising customary laws relating to ICIP.³

The Significance of 'Culture' to Aboriginal Communities

Fay Nelson notes that Aboriginal people identify by reference to their traditional homelands – their 'country'. Country connotes the place (physically, spiritually and culturally) where Aboriginal people were 'given life'.⁴ Nelson explains that ancestral beings

divided the continent into those 500 or so separate Aboriginal countries and they taught Aboriginal people about who they were, where they belonged and who they belonged to.⁵

Aboriginal people do not compartmentalise their culture into 'little boxes', nor do they 'put religion aside for one ... day of the week'.⁶ Aboriginal groups know how their culture operates because their parents and kin groups have transmitted and taught them this knowledge.⁷

Customary law preserves traditional knowledge: 'arts and art practice is kept to customary law'.⁸ This is

1. Daes EIA, *Some Observations and Current Developments on the Protection of the Intellectual Property of Indigenous Peoples* (Geneva, 23–24 July 1998).
2. McKeough J & Stewart A, 'Intellectual Property and The Dreaming', in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 56.
3. Janke T & Quiggin R, *Indigenous Cultural and Intellectual Property and Customary Law*, LRCWA, Project No 94, Background Paper No 12 (March 2005) 12. Some of the information highlighted in this section of the paper is discussed in further detail in Kendall CN & Meddin S, 'Accessorising Aboriginality: Heritage piracy and the failure of intellectual property regimes to safeguard Indigenous culture' (1994) 16 *Bond Law Review* 166.
4. Nelson F, 'Copyright & Ownership' (Paper presented at Aboriginal & Torres Strait Islander Arts Board of Australia Council, DARE National CCD Conference, 1997) 1.
5. *Ibid.*
6. *Ibid.* 2.
7. *Ibid.*
8. *Ibid.* See also von Doussa J on complex customary law regulation of artistic practices: *Milpurrurru v Indofurn Pty Ltd* (1994) 30 IPR 209, 214–15, cited in McKeough J & Stewart A, 'Intellectual Property and The Dreaming', in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 53–54.

perceived as a means of keeping 'to the teachings of the dreaming ancestors'.⁹ Changes to art symbols and designs, for example, are not sanctioned. Change to art practice is only legitimately found in 'the movement of the hand and the brush'.¹⁰ Cultural practice and transmission is not static within this model; rather, changes are subtle and complex. Change is seen in the wider context of preserving the dreamings.

Jill McKeough and Andrew Stewart argue that 'the most enduring Aboriginal heritage is intangible'.¹¹ Aboriginal cultural heritage takes many forms, 'including images of the dreaming – of the ancestral past that is preserved in tribal lore and periodically recreated in artworks of various kinds (cave paintings, sand sculptures, facial and body painting, etc)'.¹² These customs were considered crucial to the community's social cohesion: they functioned both as a means of dispute resolution as well as a means of providing 'amusement and education' to the community.¹³ Artistic practice in the context of Aboriginal heritage acts as the community's 'social cement' and creates invisible 'bonds that enabled social and spiritual contact'.¹⁴

Customary law provides a means of strictly controlling who has access to the use of certain images and information. It functions as a way to maintain social boundaries between one community and another. Within communities, customary laws enable differentiations in status, often based on age, gender, descent and experience.¹⁵

As Janke and Quiggin explain, despite the fact that there are many different Indigenous groups in Australia, with each group having ownership of rights over its particular cultural heritage, there are nonetheless a set of consistent principles underlying the ownership and control of each group's Indigenous cultural and intellectual property (ICIP):



1. Communal ownership and attribution

Indigenous cultural and intellectual property is collectively owned, socially based and evolving continuously. A great number of generations contribute to the ongoing creation of ICIP. Attribution as a group for this contribution is a cultural right.

2. Continuing obligation under indigenous laws to maintain cultural integrity

Another common factor shared by Indigenous groups is that there are generally well-defined laws within each group governing rights to use and deal with Indigenous cultural and intellectual property. These laws are based on positive obligations toward cultural knowledge and the need to ensure that the culture is maintained and protected so that it can be passed on to future generations. To ensure this, there is often an individual or group who is the custodian or caretaker of a particular item of heritage. The traditional custodian acts as a trustee, whose role it is to pass on the knowledge and ensure that its use conforms to the best interests of the community.

3. Consent and decision-making procedures

Similarly, consent to share Indigenous cultural knowledge must be given by the group as a collective. Such consent is given through specific decision-making procedures, which differ depending on the nature of the particular cultural item. Consent procedures may differ from group to group. Furthermore, consent is not permanent and may be revoked.¹⁶

9. Nelson F, 'Copyright & Ownership' (Paper presented at Aboriginal & Torres Strait Islander Arts Board of Australia Council, DARE National CCD Conference, 1997) 1.
10. Ibid.
11. McKeough J & Stewart A, 'Intellectual Property and The Dreaming', in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996).
12. Aboriginal heritage also functions to transmit 'each community's oral history, the details of certain rituals and ceremonies, the music and dance sequences used at gatherings and knowledge of the natural environment inhabited by the community': ibid 53.
13. Ibid.
14. Puri K, 'Cultural Ownership and Intellectual Property Rights Post-Mabo: Putting Ideas into Action' (1995) 9 *Intellectual Property Journal* 295.
15. McKeough J & Stewart A, 'Intellectual Property and The Dreaming', in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 53.
16. Janke T & Quiggin R, *Indigenous Cultural and Intellectual Property and Customary Law*, LRCWA, Project No 94, Background Paper No 12 (March 2005) 9–10.

Australia's current intellectual property laws do not adequately safeguard these underlying cultural principles. Historically, Australian 'settlement' was seen as an opportunity for transplanting European/British sovereignty and legal discourse. Within European colonial discourse, indigenous inhabitants were seen to not exist, or at a minimum to have no rights regarding their lands.¹⁷ Indigenous peoples were treated as romantically 'discovered' as a passive, homogenous group named 'Aborigines' by the colonisers. As such, appropriation of Aboriginal works should be seen in the context of settlement narratives that explicitly sought to exclude Aboriginal peoples from the emerging polity.¹⁸ Overt acts of oppression, justified as necessary for constructing a new, 'better', 'civilised' home for new arrivals (those who claimed to have 'discovered' a land which was, in their eyes, *terra nullius*) underpinned the dominator's efforts to systematically destroy the *meaning* that Aboriginal people ascribed to themselves, their families and their communities. Culturally and legally, the end result has left Indigenous Australians with little legal recourse for infringements of their cultural and intellectual property rights – in part because they are simply not recognised as valid by a legal system that has denied their existence.

Cultural appropriation that cannot be redressed within intellectual property regimes has enduring effects for



the Aboriginal community whose rights are infringed. Appropriation continues the colonial legacy of dispossession. Aboriginal people are 'denied status as fellow members of a multi-cultural society'.¹⁹ For example, core Aboriginal cultural values—such as maintaining the secrecy of knowledge of ceremonies encoded in visual imagery—are derogated from by inappropriate commercial use of these cultural practices.

Conflicts Between Aboriginal Customary Law and Australian Intellectual Property Laws

Copyright Law and Aboriginal Artistic Works

Copyright is the term used to describe the bundle of rights given to the producer of a creative work. These rights protect that work from being used without the owner's permission. It is an 'intangible property which allows the copyright owner, or those authorised by the copyright owner, the exclusive right to prohibit or to do certain acts'.²⁰

Copyright today covers a broad range of intellectual pursuits. Copyright is recognised in original literary, dramatic, musical or artistic works²¹ (collectively known as Part III works), as well as sound recordings,²² films,²³ broadcasts²⁴ and typographical arrangements of published editions²⁵ (known as Part IV works). Some performances also attract copyright protection.²⁶ There is no need to register to obtain copyright protection as in other areas of intellectual property – rights accrue automatically once certain requirements are satisfied.

While there are many areas of intellectual property law that fail to recognise the distinct needs of Indigenous Australians, it is fair to say that one area that is beginning to receive considerable attention and which merits government intervention is that relating to the theft

17. Battersby J, 'Legislative Developments in Australia', in Prott L & Specht J (eds), *Protection or Plunder: Safeguarding the future of our cultural heritage – Papers of the UNESCO Regional Seminar on the Movable Cultural Property Convention, Brisbane 1986* (Canberra: Australian Government Publishing Service, 1989) 85.
18. Dodson M & Strelein L, 'Australia's Nation-Building: Renegotiating the relationship between Indigenous peoples and the state' (2001) 24 *University of New South Wales Law Journal* 826.
19. Coombe RJ, 'The Properties of Culture and the Politics of Possessing Identity', in *The Cultural Life of Intellectual Properties: Authorship, Appropriation and the Law* (Durham: Duke University Press; 1998) 208.
20. Nygh PE & Butt P (eds), *Butterworths Concise Australian Legal Dictionary* (Sydney: Butterworths, 1997) 91.
21. *Copyright Act 1968* (Cth) s 32.
22. *Copyright Act 1968* (Cth) s 89.
23. *Copyright Act 1968* (Cth) s 90.
24. *Copyright Act 1968* (Cth) s 91.
25. *Copyright Act 1968* (Cth) s 92.
26. *Copyright Act 1968* (Cth) Pt XIA.

Cultural appropriation that cannot be redressed within intellectual property regimes has enduring effects for the Aboriginal community whose rights are infringed.

of Indigenous art. Section 10(1) of the *Copyright Act 1968* (Cth) provides the following definition of 'artistic work':

Artistic work means:

- (a) a painting, sculpture, drawing, engraving or photograph, whether the work is of artistic quality or not;
- (b) a building or a model of a building, whether the building or model is of artistic quality or not; or
- (c) a work of artistic craftsmanship to which neither of the last two preceding paragraphs applies; but does not include a circuit layout within the meaning of the *Circuit Layouts Act 1989*.²⁷

Since the 1970s Aboriginal artists have been calling for better protection of their cultural heritage expressed in artistic form. Many have expressed frustration with the misappropriation of traditional designs and symbols for use on kitsch souvenirs aimed at the tourist market. These illegal uses not only offend them personally, but also affront their traditional ways and customs. They disrespect Aboriginal culture and marginalise the religious and spiritual significance of the works in question.²⁸ As Wanjuk Marika explains:

Our policy is not to prevent the works of Aboriginal artists being reproduced – on the contrary, we seek to encourage such activity, for we are happy to see that people all over the world are interested in Australian Aboriginal culture. But it is hard to imagine the works of great Australian artists such as Sidney Nolan or Pro Hart being reproduced without their permission. We are only asking that we be granted the same recognition, that our works be respected and that we be acknowledged as the rightful owners of our works of art.²⁹

In 1997 the value of the Aboriginal arts and crafts market was estimated at almost \$200 million per annum, more than half of which was generated from tourism.³⁰ Unfortunately, Indigenous contribution to the Aboriginal arts and crafts industry is often 'unpaid and undervalued', with many artists receiving little if anything for the sale of their works.³¹ Still others lose out to those who pirate their materials – such copyright infringement is carried out largely by the tourism industry.³²

Those most affected by the infringement of Aboriginal rights under the *Copyright Act* are traditional artists. Most live in remote areas and have little contact with Anglo-Australia. Because of this isolation many of these artists are unaware that their art, produced for their own communities because of its cultural and educational significance, has been illegally reproduced. Even fewer are aware that they have legal rights under the *Copyright Act*.³³

For those who are aware of their legal rights, other factors such as 'limited funding available to bring copyright infringement actions prevents them from mounting an action to defend their rights'.³⁴ Many see civil litigation as futile: because settlement of actions is the norm, there is little precedent for courts to follow. Settlements, in turn, only serve to reinforce the unequal bargaining power between Aboriginal and non-Aboriginal Australians, resulting in inadequate compensation for those whose works have been pirated.³⁵ To date, there have been no successful criminal prosecutions of copyright piracy of Aboriginal art or music.

27. *Copyright Act 1968* (Cth) s 10(1).

28. Bell R, 'Protection of Aboriginal Folklore: Or do they dust reports?' (1985) 17 *Aboriginal Law Bulletin* 6. Discussed in detail in Dawson N, 'Tell Em They're Dreaming: Is Aboriginal art protected by copyright?' (unpublished Honours thesis, Murdoch University School of Law, 2000).

29. Marika W, 'Copyright in Aboriginal Art', *Aboriginal News*, February 1976, 7; quoted in Johnson V, 'A Whiter Shade of Palaeolithic: Aboriginal art and appropriation' (1988) 2(34) *Aboriginal Law Bulletin* 4.

30. ATSIC, *National Aboriginal and Torres Strait Islander Cultural Industry Strategy*, (Canberra: Focus, 1997) 5, quoted in Janke T, *Our Culture: Our Future – Report on Australian Indigenous Cultural and Intellectual Property Rights* (Sydney: Michael Frankel & Company, 1998) 13.

31. Janke T, 'Don't Give Away Your Valuable Cultural Assets: Advice for Indigenous peoples' (1998) 4(11) *Indigenous Law Bulletin* 8.

32. National Indigenous Arts Advocacy Association, 'Submission to the Standing Committee on Constitutional and Legal Affairs' S730.

33. Noted in Dawson N, 'Tell 'Em They're Dreaming: Is Aboriginal art protected by copyright?' (unpublished Honours thesis, Murdoch University School of Law, 2000) 27. See also Ward A, 'Blind Justice or Blinkered Vision?' (1993) 52 *Meanjin* 719, 724.

34. Dawson, *ibid* 28, citing Hawkins C, 'Stopping the Rip-Offs: Protecting Aboriginal and Torres Strait Islander cultural expression' (1995) 20 *Alternative Law Journal* 7, 9.

35. *Ibid*.

Obtaining copyright protection: conflicts with customary law

In order to obtain copyright protection, an artistic work must:

- (a) be created by a 'qualified person'³⁶ or first published in Australia;³⁷
- (b) be original;³⁸
- (d) be in a material form;³⁹ and,
- (d) satisfy the *de minimis* principle.⁴⁰

Once copyright is found to exist, the author is granted protection for 70 years from the date the work first existed in material form.

As Janke and Quiggin explain, these requirements do not sit comfortably with Aboriginal notions of ownership and custom. Commenting specifically on the 70-year time limitation for copyright protection, the authors note that:

The *Copyright Act* does not recognise any continuing right of the Indigenous custodians to their ICIP after the term of copyright protection has expired. Cultural works remain part of an Indigenous clan's culture and are of great significance to their traditional custodians in perpetuity. The unauthorised use may be against cultural laws and may cause deep offence. For instance, the reproduction of *wandjina* and *mimi* figures on commercial products is a concern for Indigenous custodians. These images are copied from rock art, which has no copyright protection; therefore, traditional owners cannot use copyright to stop reproductions of the rock art. There are many types of Indigenous cultural works that do not fit within the legislative scheme of the *Copyright Act*. For instance, works that were produced a long time ago or where the author cannot be identified accurately and, in any case, has passed away long ago, are not easily protected under the *Copyright Act*.⁴¹

Also of considerable concern in relation to the protection of ICIP is the fact that Australian intellectual property law does not recognise communal ownership.

ICIP is communally owned. Traditional knowledge, songs, stories, dances and resources are held for the benefit of the group as a whole. Copyright provides ownership of a work to the individual creator. But how does this apply to Indigenous material that is created through the process of handing on a song or story and creating over the generations?

There are provisions for joint ownership of copyright for works produced by 'the collaboration of two or more authors and in which the contribution of each author is not separate from the contribution of the other author or the contributions of the other authors'. Each author must have been responsible for reducing the work to a material form rather than having an incidental role or supplying the idea for the work. The artist must contribute to the work by way of skill and labour. It is not enough to inspire or make suggestions. Hence, the joint ownership of a work does not refer to the handing down of Indigenous knowledge over the generations.⁴²

Appropriation of Aboriginal art in Australia includes, but is not limited to, 'unauthorised imitation of ... art', via 'direct copying of works', 'borrowing ... [of] Aboriginal themes', images or styles, or incorporation of traditional motifs into artwork in an unsanctioned manner.⁴³ Aboriginal and non-Aboriginal artists may produce 'Aboriginal art' without permission from the traditional owners of the images and knowledge. The majority of appropriation is through 'business profiteering', where imitation and 'culturally insensitive' copying and alteration of Aboriginal designs occur.⁴⁴

Aboriginal action to redress artistic appropriation does not sit easily within intellectual property law. Often, Aboriginal artists who have copyright over their works will not be seen within traditional customary schemes as the owners of the images in their work. Aboriginal communities may perceive themselves as communally and collectively holding the property rights in question.⁴⁵ Artistic works are embedded in notions of appropriate access, transmission and dissemination of cultural signs. Communities attach strict meanings to significant and

36. *Copyright Act 1968* (Cth) s 32(1).

37. *Copyright Act 1968* (Cth) s 32(2).

38. *Copyright Act 1968* (Cth) ss 32(1) & (2).

39. *Copyright Act 1968* (Cth) s 22(1).

40. Even if a work satisfies the statutory criteria set out in the *Copyright Act*, it may still be denied copyright protection. It was held in *Kenrick v Lawrence* (1890) 25 QBD 93, for example, that some expressions are too simple to warrant the protection of copyright. This is referred to as the *de minimis* principle. If, for example, there is only one way of expressing an idea, that expression will not be protected. To do so would prevent others from using that expression and would effectively create a monopoly in an idea – something copyright law aims to avoid.

41. Janke T & Quiggin R, *Indigenous Cultural and Intellectual Property and Customary Law*, LRCWA, Project No 94, Background Paper No 12 (March 2005) 18.

42. Ibid 19. See also Nicholls C, 'What is Authorship' (2000) 25(4) *Alternative Law Journal* 187–89.

43. McKeough J & Stewart A, 'Intellectual Property and The Dreaming', in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 55.

44. Ibid 65.

45. Ibid 62.

Aboriginal action to redress artistic appropriation does not sit easily within intellectual property law.

valuable cultural 'property'.⁴⁶ 'An artist [may have] been given permission to depict a design; [this] does not mean what is produced is "owned" by that person'.⁴⁷

Australian copyright law, like most received English law, is premised on individual ownership and rights.⁴⁸ Although courts struggle with cultural difference associated with individual and communal ownership, they are willing to hear evidence of distinct Indigenous collective ownership over imagery and art.⁴⁹ Customary legal regulation of access to or reproduction of Aboriginal art may be judicially acknowledged; however, in *Milpururru v Indofurn Pty Ltd*, von Doussa J clearly stated that customary law obligations cannot be a relevant factor in considering if a remedy is available for breach of Aboriginal copyright under existing statutory regimes.⁵⁰

Aboriginal artists who are established and recognised as 'fine artists' are also more likely to receive protection for copyright breaches.⁵¹ This results primarily from an Anglo schema of dividing art into different categories, such as tourist art. Such divisions inform the value ascribed to works in the market place, but are alien to traditional Indigenous cultural paradigms of value and worth. The few Aboriginal artists who can fit themselves within 'fine art' categories are best able to use copyright regimes and remedies for appropriation. However, since Western conceptions of 'fine art' assume their privilege through the absence of 'shared experiences and mutually understood symbols' (the separation of 'fine art' from culture

and tradition), those Aboriginal artists whose works can be designated as 'fine art' are unlikely to fall within traditional artistic categories. As such, their Aboriginality is only peripheral to the artwork in question. In such cases, it is not Aboriginal *art*; it is merely the work of an Aboriginal *artist*.

A further problem arises in relation to negotiating advantageous bargains for the transferral of copyright rights. Bargaining is a means in intellectual property law for 'copyright holders to exploit their property right by allowing others to use their copyright for whatever means the owner sees fit'.⁵² Aboriginal people may wish to assign or licence their copyright to others for financial gain. However, many bargains 'negotiated' to this end are often 'deliberately vague about the rights being transferred' or 'simply unfair'⁵³ and pave the way for



46. Ibid.

47. Ibid.

48. Ibid.

49. Note the evidence presented by Terry Yumbulul concerning secret practices surrounding artistic creation of morning star poles and the need for approval of relevant clan members to use specific imagery in *Yumbulul v Reserve Bank of Australia* (1991) 21 IPR 481, 490.

50. *Milpururru v Indofurn Pty Ltd* (1994) 30 IPR 209, 239 (von Doussa J).

51. This seems to be the case for artists generally within intellectual property regimes because 'artists are valued for their idiosyncrasies and their self-absorbed subjectivity, conflicting with their potential role as eloquent voices for the voiceless within a larger community of shared experiences and mutually understood symbols': Barsh R, 'Grounded Visions: Native American conceptions of landscapes and ceremony' (2000) 13 *St Thomas Law Review* 136. Indeed, the methodological underpinnings of creative individualism in this context are undeniable. However, it should be noted here that it is precisely this *voicelessness* within the larger community that has driven the movement towards preserving Aboriginal art to international forums.

52. McKeough J & Stewart A, 'Intellectual Property and The Dreaming', in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 67.

53. (1995) 9 *Art Law: Newsletter of the Arts Law Centre of Australia* 3.

exploitation of Aboriginal artists.⁵⁴ Artists may transfer their copyright conditionally. Imagery may be assigned for the purpose of education and increasing knowledge of indigenous culture. The licensee or infringer may then use the imagery for an unsanctioned use – such as for making and marketing carpets with ‘authentic Aboriginal designs’.⁵⁵ Such blatantly inappropriate use may attract legal remedy. This is especially so where the appropriator ‘borrows’ from prominent Aboriginal artists.⁵⁶

More subtle and complex issues arise in relation to licensing agreements. Traditional communities may not wish to demarcate an Aboriginal copyright holder as the ‘owner’ of artistic imagery. An artist may be given limited permission to use a traditional symbol. This artist may give consent regarding use of the work in question to a third party. Intellectual property law has difficulty dealing with a scenario (as in *Yumbululu*) where this third party infringes the particular traditional permission granted to the artist. Consent given by the artists to the licensee will be perceived in law as wholesale consent. If the copyright owner has given consent to a third party, the traditional owner’s position on consent is not a relevant judicial consideration and no infringement may be seen to occur.⁵⁷

Additional problems arise in relation to monitoring use of assigned copyright in accordance with the particular type of consent given under contract. If a contract is successfully negotiated and contains a transferral of copyright rights for certain purposes, it is difficult for Aboriginal artists to ascertain if the licensee is adhering to the limited consent given under contract.⁵⁸

Protecting the copyright of Indigenous cultural and intellectual property in Western Australia

Because intellectual property laws remain the jurisdiction of the Commonwealth government, there is very little that the state government can do to alleviate the

problems raised above. Having said that, there are certain administrative measures that can be taken to better educate the public about the plight of those charged with protecting ICIP. Steps can also be taken to implement protocols for those persons and bodies who are likely to deal with ICIP; thereby ensuring that ICIP rights are not infringed. Indigenous protocols arise from value systems and cultural principles developed within and across communities over time. They reflect appropriate ways of using cultural material, and interacting with Aboriginal artists and Aboriginal communities.⁵⁹ The Western Australian government, working with major cultural bodies and agencies, has recently encouraged the use of protocols and guidelines for working with Aboriginal artists and cultural material:

The Western Australian culture and the arts portfolio is committed to working with Indigenous peoples to protect, preserve and maintain Indigenous culture. European or colonial settlement in Western Australia has had a major impact on Indigenous peoples and their culture. Sustainability of Indigenous cultures is therefore critical and actively contributes to individual, community and regional identity. The recognition of intellectual property rights is at the heart of sustainability. In response to the work of the Heritage Collections Council of the Cultural Minister’s Council, the portfolio also endorses the view of the Heritage Collections Council that there is a need to develop significant guidelines as a means of developing benchmarks in the care and management of Indigenous collections. The culture and the arts portfolio will advocate that Indigenous representatives should be centrally involved in the advancement of this work ...

The Western Australian Museum is actively involved in the return of Indigenous cultural property, both skeletal and sacred materials. The State Records Office, the Department of Indigenous Affairs Family History Unit and the Department for Community Development Family Information Records Bureau and the Battye Library are all actively involved in assisting Indigenous communities to access and use Indigenous cultural heritage materials for research, reunion and other cultural activities. ArtsWA advocates Indigenous

54. Bargains are often unfair for artists in general, who have ‘little choice other than to assign or sell (their copyright)’ if they want a wider income and an audience/market for their work: McKeough J & Stewart A, ‘Intellectual Property and The Dreaming’, in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 68.

55. As in *Milpururru v Indofurn Pty Ltd* (1994) 30 IPR 209.

56. *Ibid* 209.

57. McKeough J & Stewart A, ‘Intellectual Property and The Dreaming’, in Johnston E, Hinton M & Rigney D (eds), *Indigenous Australians and the Law* (Sydney: Cavendish, 1996) 67, regarding *Yumbululu v Reserve Bank of Australia Ltd* (1991) 21 IPR 481.

58. *Ibid* 67–68. McKeough and Stewart note that similar problems exist for all artists regarding copyright contracts. Centralised copyright collecting societies for visual artists, such as VISCOPY, and some Aboriginal bodies, such as the National Indigenous Arts Advocacy Association (NIAAA), act as copyright collecting agencies aiding artists in monitoring the use of their work and, in the case of NIAAA, articulating claims for remuneration where appropriate.

59. Department of Culture and the Arts for Western Australia, *Cultural Commitments: Indigenous Policy Statement and Action Plan* (Perth: Government of Western Australia, June 2004) 3.

ownership of intellectual property through its funding program and strategic partnerships.⁶⁰

These protocols are to be encouraged and should be sufficiently funded. They should also be extended to *all* industries and companies that profit from the use and sale of ICIP.

Proposal 60

That protocols relating to the use, sale and protection of Indigenous cultural and intellectual property be developed and promoted in Western Australia. Such protocols should inform Western Australian government agencies and educational and cultural institutions in their dealings with Aboriginal artists and the observance of these protocols by all Western Australian industries, companies and individuals should be actively encouraged by government.

Biotechnological Research and Indigenous Intellectual Property in the Regulation of Resources

In 1995, Michael Dodson (then Aboriginal and Torres Strait Islander Social Justice Commissioner) observed that:

Scientists, medical researchers and other 'experts' visit our communities, often uninvited and unwanted, to study, take samples and measurements, and tell us what is wrong with us and what is good for us. They conclude so called 'agreements' with us to enable them to develop pharmaceuticals, foods and other products from our lands, forests and waterways. They tell us that we will get something back from their 'research and development'. They tell us that we will gain other benefits such as employment, better health services, housing, and roads. We wait. Our voices are crushed by the silence. We die sick, defeated, alone and forgotten.⁶¹

Janke and Quiggin claim that one area of considerable concern to Western Australian Aboriginal communities is the 'bioprospecting' of Aboriginal knowledge.

Bioprospecting refers to the exploration of biodiversity (that is, plant-related substances) for commercially valuable genetic and biochemical resources, with particular reference to the pharmaceutical, biotechnological and agricultural industries.⁶² This is a serious issue for Indigenous peoples because:

Indigenous peoples hold important knowledge in relation to the cultivation, collection, preparation and uses of many plants, animals and minerals. Indigenous people's knowledge about the biota of a region relates to, inter alia, medicine, nutrition, agriculture and land care, the arts, ceremony and other uses. While Indigenous people may not regard the biota of a region as resources, much of Australia's law in relation to management of resources has implications for Indigenous knowledge holders.

Knowledge of the properties and uses of these materials that is held by Indigenous people is often referred to as 'traditional knowledge' or 'Indigenous knowledge'. Customary law may inform the content of Indigenous knowledge; for instance it may set out the manner in which a remedy is prepared, when it can be used and who can use it.

...

There are many instances of Indigenous knowledge contributing to the development of useful medicinal and other products. But there are many instances in which Indigenous peoples' customary laws have been contravened or disregarded through lack of accurate information, consultation, consent, acknowledgement and benefit sharing.⁶³

A local example, often cited in support of the proposition that traditional medical knowledge is being exploited with no return to Aboriginal peoples, is the agreement between the Western Australian Department of Conservation and Land Management (CALM) and Victorian-based multinational pharmaceutical company Amrad (in collaboration with the US National Cancer Institute) to develop the patent for an anti-AIDS drug from a species of smoke bush (genus *conospermum*), a plant that is common to the south-west of Western Australia. The active component isolated from the plant was conocurvone, which was found to 'destroy the HIV virus in low concentrations'.⁶⁴ The smoke bush plant has traditionally been used by

60. Ibid 5. The Department of Consumer Protection (WA) has also sponsored a statewide project—*Artists in the Black*—which runs educational intellectual property workshops throughout Western Australia including sessions on copyright, moral rights, contracts, certificates of authenticity, licensing, ICIP and business structures to protect communal intellectual property.

61. Dodson M, 'Indigenous Peoples and Intellectual Property Rights', in *Ecopolitics IX Conference Papers and Resolutions: Perspectives on Indigenous Peoples' management of environment resources* (Darwin: Northern Territory University, 1–3 September 1995) 35.

62. Posey DA, 'Indigenous Peoples and Traditional Resource Rights: A basis for equitable relationships?' in ibid 43, 46. See also Davis M, *Biological Diversity and Indigenous Knowledge*, Parliament of Australia Research Paper No 17 (29 June 1998).

63. Janke T & Quiggin R, *Indigenous Cultural and Intellectual Property and Customary Law*, LRCWA, Project No 94, Background Paper No 12 (March 2005) 54–55.

64. Davis M, *Biological Diversity and Indigenous Knowledge*, Parliament of Australia Research Paper No 17 (29 June 1998) 4.



Aboriginal peoples for therapeutic purposes; however, the agreement between the Western Australian government and Amrad did not contain any provision for the remuneration of the Aboriginal peoples who first identified the medicinal benefits of the smoke bush plant.⁶⁵

As Janke and Quiggin explain, while Aboriginal people generally support the scientific development of new medical treatments, they are also justifiably concerned that any such discoveries acknowledge and respect Aboriginal customary laws relevant to the preservation of the land and the transmission of cultural knowledge. To ensure that this is done, the authors propose the following methods of ensuring that ICIP is safeguarded:

- Seeking consultation with Indigenous people as to their customary law and other requirements.
- Compliance with Indigenous peoples' customary law and other requirements.
- Provision of comprehensive information to Indigenous people on proposed collection activities, research, development, commercial exploitation of any biological resources and knowledge, potential impacts on daily activities of Indigenous peoples, the ownership of biological resources and their derivatives, the ownership of Indigenous knowledge, and any possible future impacts or uses of resources and knowledge.
- Seeking prior informed consent for the use of any Indigenous knowledge.
- Seeking prior informed consent for access to

Indigenous land for any purposes including collection.

- Ethical conduct in any consultation, collection or other processes.
- Agreements on mutually agreed terms with Indigenous people for all parts of the process.
- Equitable benefit sharing arrangements.
- Acknowledgement of Indigenous peoples contribution.
- Other requirements determined by Indigenous people according to their customary law.⁶⁶

Janke and Quiggin conclude:

The experience of the Western Australian government and Indigenous people in relation to smoke bush is proof of the need for regulation of biological resources. Such regulation would acknowledge Indigenous peoples' rights over land, biological resources and related knowledge, as well as respect for Indigenous customary laws. For Indigenous people, lack of recognition, consultation, participation and benefit-sharing has made the smoke bush case synonymous with biopiracy. Strong regulation is needed to provide recognition, respect and enforcement of Indigenous customary law.⁶⁷

In 2002 the Commonwealth and state and territory governments committed to a 'Nationally Consistent Approach for Access to and Utilisation of Australia's Native Genetic and Biochemical Resources'. This agreement is intended to give effect to Australia's obligations to ecological sustainability under the

65. Blakeney M, 'Bioprospecting and the Protection of Traditional Medical Knowledge of Indigenous Peoples: An Australian perspective' (1997) 19 (6) *European Intellectual Property Review* 298, cited in Parke M, 'Bioprospecting of Traditional Medical Knowledge' (unpublished paper, Murdoch University School of Law, 2004) 11. If conocurvene is successfully commercialised it is estimated that the Western Australian government will receive over \$100 million in royalties; although Janke and Quiggin note that 'to date no large-scale commercialisation has occurred': Janke T & Quiggin R, *Indigenous Cultural and Intellectual Property and Customary Law*, LRCWA, Project No 94, Background Paper No 12 (March 2005) 58.

66. Janke & Quiggin, *ibid* 59.

67. *Ibid*.

international *Convention on Biodiversity* and encourage the type of bio-investment in Australia described in the example above.⁶⁸ Article 8(j) of the *Convention on Biodiversity* encourages signatories to:

[R]espect, preserve and maintain traditional knowledge, innovations and practices of Indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilisation of such knowledge, innovations and practices.⁶⁹

In 1999 the Commonwealth government enacted the *Environment Protection and Biodiversity Act 1999* (Cth). This Act essentially implements the Convention in respect of Commonwealth landholdings and includes references to matters contained in Article 8(j). Western Australia has committed to introducing biodiversity conservation legislation that introduces a terrestrial bioprospecting licensing regime to ensure that:

- biological resources are used in an ecologically sustainable manner and biodiversity is protected;
- benefits arising from exploitation of Western Australia's biological resources are shared with the Western Australian community; and
- Aboriginal people's native title and intellectual property rights are recognised and protected.⁷⁰

In December 2004 CALM released a discussion paper seeking public submissions on the subject of a state biodiversity conservation strategy and is currently in the process of analysing those submissions. The Minister for the Environment has indicated that the final biodiversity conservation strategy and accompanying Bill will be introduced into Parliament in 2006.⁷¹

Although the Commission acknowledges the complexity of this task and applauds the government's consultative processes in relation to development of Western Australia's biodiversity conservation strategy, it recognises that bioprospecting of traditional Aboriginal knowledge meanwhile remains unprotected. The Commission understands that this issue is important to Indigenous people and that unregulated bioprospecting could represent a lost opportunity for some Aboriginal

communities to capitalise on their traditional knowledge and to develop the community's economic base. The Commission believes that there is a need for the immediate development of protocols to guide government agencies and Western Australian industries in dealing with biological resources and to ensure that consultation (and, where relevant, benefit-sharing) is undertaken with Aboriginal communities as a matter of course. It is the Commission's opinion that these protocols should especially be followed in relation to relevant agreements entered into under the 'business undertakings' power in s 34A of the *Conservation and Land Management Act 1984* (WA).⁷²

Proposal 61

That the Western Australian government develop protocols aimed at addressing those issues that arise from the 'bioprospecting' of Aboriginal medical knowledge; that is, the exploration of biodiversity for commercially valuable genetic and biochemical resources. These protocols should aim to safeguard Indigenous cultural and intellectual property by ensuring that those who seek to benefit from traditional cultural knowledge:

- undertake direct consultation with Aboriginal people as to their customary law and other requirements;
- ensure compliance with Aboriginal peoples' customary law and other requirements;
- seek prior informed consent for the use of any Aboriginal knowledge from the custodians of that traditional knowledge;
- seek prior informed consent for access to Aboriginal land for any purposes including collection;
- ensure ethical conduct in any consultation, collection or other processes;
- ensure the use of agreements on mutually agreed terms with Aboriginal people for all parts of the process; and
- devise equitable benefit-sharing arrangements for Aboriginal people.

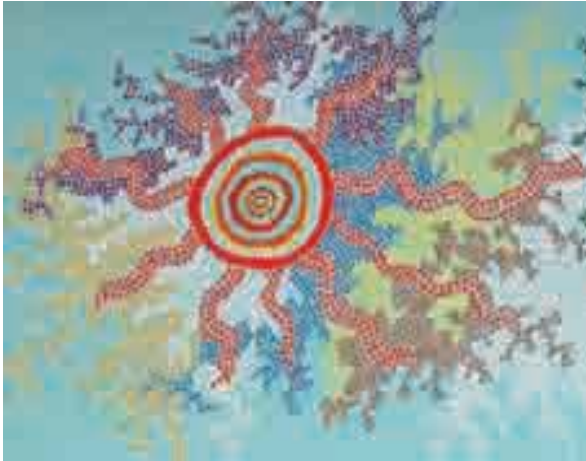
68. Ibid 61–62.

69. *Convention on Biological Diversity 1992*, Article 8(j). Australia ratified the Convention in 1993.

70. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002) <http://www.naturebase.net/biocon_act_consult_text.html>.

71. Western Australia, *Parliamentary Debates*, Legislative Council, 7 April 2005, 493b (Mr Kim Chance representing the Minister for the Environment).

72. In particular agreements 'to promote and encourage the use of flora for therapeutic, scientific or horticultural purposes for the good of people in this State or elsewhere, and to undertake any project or operation relating to the use of flora for such a purpose': *Conservation and Land Management Act 1984* (WA) s 33(1)(ca).



Other Matters

Western Australia's Minister for Culture and the Arts, Sheila McHale MLA, has noted the importance of the diverse Indigenous cultural contribution to the state's arts, ecology and tourism sectors, and to the overall economy.⁷³ The state government has also announced its commitment to the recognition and support of 'Indigenous ownership of their cultural material and intellectual property' and to facilitating 'a better understanding of Indigenous intellectual property and copyright – with respect to the law and Indigenous protocols'.⁷⁴ Nonetheless, the theft and misuse of

Indigenous intellectual and cultural property in Western Australia continues.

Because intellectual property is in many respects beyond the legislative competence of the Western Australian Parliament it might be thought that the state's efforts to improve recognition of ICIP are limited to the establishment of administrative protocols and guidelines of the type proposed above. However, the state can also impact positively upon the rights of Indigenous artists and intellectual property holders by lending its vocal support to the review of intellectual property laws at the Commonwealth level to better protect ICIP. In this regard the Commission notes that Article 29 of the United Nations *Draft Declaration on the Rights of Indigenous Peoples* recognises that indigenous peoples have the right to full ownership, control and protection of their cultural and intellectual property and that states should provide for special measures (authorised in Australia under s 8 of the *Racial Discrimination Act 1975*) to protect such rights.

Proposal 62

That the Western Australian government support and encourage the review of Commonwealth intellectual property laws and the institution of special measures to provide better protection for Indigenous cultural and intellectual property.

73. Department of Culture and the Arts for Western Australia, *Cultural Commitments: Indigenous Policy Statement and Action Plan* (Perth: Government of Western Australia, June 2004) i.

74. Ibid 8.

PART VII

Aboriginal Customary Law and the Family

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Aboriginal Customary Law and the Family

Jurisdictional Limitations

Under the Australian Constitution, the power to make laws regarding marriage, nullity and divorce, matrimonial causes (property, child support and spousal maintenance disputes) and the custody of children the subject of a marriage is vested exclusively in the Commonwealth Parliament.¹ The Western Australian Parliament therefore has no power to effect recognition of Aboriginal customary law in these areas. However, unlike the other Australian states and territories (which have conceded certain powers to the Commonwealth) Western Australia chose to retain legislative power to deal with family law matters not covered by the Australian Constitution (that is, not concerning a legal marriage). These include:

- parenting disputes involving ex-nuptial children;
- de facto marriage financial and property disputes; and
- child support for ex-nuptial children.²

For these purposes Western Australia established its own discrete Family Court exercising combined state and federal jurisdiction in family law matters. In this regard the *Family Law Act 1975* (Cth) governs disputes relating to the dissolution of a lawful marriage, including disputes involving the children of a marriage, whilst the *Family Court Act 1997* (WA) governs disputes relating to ex-nuptial children and the dissolution of de-facto relationships.³ The application of these laws to children the subject of parenting disputes is of particular concern. In all other Australian jurisdictions the Commonwealth Act applies to ex-nuptial children *and* the children of a marriage; however in Western Australia, the Commonwealth Act applies to nuptial children while the Western Australian Act applies to ex-nuptial

children. Because changes in either law create the potential for different laws applying within Western Australia for nuptial and ex-nuptial children, it is customary that the Western Australian Act mirrors the provisions of the Commonwealth Act to ensure that all Australian children are treated equally before the law.⁴

Aboriginal people consulted by the Commission for this reference identified problems with Western Australia's jurisdictional limitations, such as the artificiality of state boundaries in respect of particular Aboriginal customary laws and communities. Some respondents also suggested that any attempt to address family law issues in Western Australia without reconsideration of the national laws under Commonwealth jurisdiction would be 'superficial'.⁵ The extent to which Western Australia can make meaningful changes to the law in this area for the benefit of all Aboriginal people in this state is therefore reasonably constrained.

The recognition of Aboriginal customary law in relation to family law at the Commonwealth level was considered in detail by the ALRC in its 1986 report. The ALRC made certain recommendations in this area, including that traditional marriages be 'functionally recognised' for the purposes of particular laws (such as those governing superannuation, tax and inheritance, and for the purposes of legitimating children of a union) but that it not be given full legal status of marriage under the *Marriage Act 1961* (Cth).⁶ The ALRC also made recommendations regarding the placement of Aboriginal children in cases relating to child custody and adoption.⁷ Whilst noting that the ALRC report is now almost 20 years old, the Commission broadly supports its recommendations pertaining to family law at the Commonwealth level. However, there are some recommendations, such as that regarding recognition

1. Australian Constitution ss 51 (xxi) & (xxii).

2. *Family Court Act 1997* (WA). See Buti T & Young L, *Family Law and Customary Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 4 (August 2004) 19.

3. Under the *Family Law Act 1975* (Cth) and the *Family Court Act 1997* (WA). For a fuller discussion of jurisdictional issues see Buti & Young, *ibid* 18–22.

4. See discussion in Buti & Young, *ibid* 18–20.

5. *Ibid*. See also LRCWA, Project No 94, *Thematic Summaries of Consultations – Manguri*, 4 November 2002.

6. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [257].

7. *Ibid* [366]–[390].

of promised marriages as a defence against unlawful carnal knowledge, that the Commission does not support. In these instances the Commission makes clear its objections and its own proposals for reform in the following discussion.

The discussion in this Part is confined mainly to those areas of law over which the state retains some legislative jurisdiction or where it can make some meaningful administrative or procedural change to recognise the cultural differences and needs of Aboriginal families. Where relevant to the position in Western Australia and the state's jurisdictional capacity, the Commission will discuss the ALRC's findings and recommendations and those of other relevant bodies.

Marriage

Although, as mentioned earlier, marriage is one area in which the Western Australian Parliament has no legislative capacity, it is useful here to briefly discuss the interaction of current Commonwealth laws of marriage and Aboriginal customary laws of marriage in Western Australia. This discussion will provide some background to the understanding of traditional Aboriginal family structures as well as assist in identifying areas where Western Australia might be able to make some changes that will assist Aboriginal families to negotiate the laws in this area.

Traditional Aboriginal Marriage

In their background paper for this reference Tony Buti and Lisa Young say that, like non-Aboriginal society, marriage is a central tenet of Aboriginal family life.⁸ However, they qualify that:

[C]ustomary Aboriginal marriage is not something that necessarily develops according to the free choice of the individuals concerned. Freedom of marriage in traditional Aboriginal society is restricted by rules that

prohibit marriage of certain close relatives and by the 'rule of exogamy', which prohibits marriage outside one's clan. In Aboriginal society, it is important that the 'right' marriages take place so that the offspring of marriage are the product of the correct family groups and affiliations.⁹

The rules of kinship are of primary importance to the traditional regulation of marriages and other relationships (both social and intimate) in Aboriginal societies. It has been observed that '[a]ll members of a tribe, and sometimes even those outside it, [are] linked in a complex network of reciprocal relationships which [form] the social basis of everyday activity'.¹⁰ According to Berndt, traditional marriage rules vary 'from one tribal unit to another',¹¹ but invariably the notion of kinship dictates whom one can marry and whom one must avoid.¹² Marriage rules served various purposes in traditional Aboriginal societies including the maintenance of genetic integrity;¹³ the assurance of continuing inheritance and performance of ritual (spiritual) obligations to land;¹⁴ the creation of alliances and reciprocal obligations between individuals, families and groups;¹⁵ and the maintenance of traditional economies trading on these familial obligations.¹⁶ Importantly, in traditional Aboriginal societies 'marriage is not seen as a contract between individuals but rather as one which implicates both kin and country men of the parties involved'.¹⁷

Traditional Aboriginal marriage involves a number of stages which usually begin with the betrothal of the female partner to the male partner, often when one partner (usually the female) is still an infant.¹⁸ In common parlance these betrothals have become known as 'promised marriages'.

Promised marriages

Promised marriages are marriages negotiated by kin and take the form of a contract (or at least an exchange of promises) between the families of the betrothed or

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8. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 6. This background paper provides a detailed discussion of the position of family law and Aboriginal customary law in Western Australia and canvasses proposals for minor legislative reform.
 9. Ibid (footnotes omitted).
 10. Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 332.
 11. Ibid 331.
 12. Generally the application of traditional marriage rules establishes the 'ideally correct' marriage for a particular person within a group; however, Berndt reported in 1962 that alternative matches were becoming increasingly permissible, generally with the sanction of the group. Ibid 333.
 13. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 3.
 14. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [223].
 15. Ibid.
 16. Kimm J, *A Fatal Conjunction: Two laws, two cultures* (Sydney: The Federation Press, 2004) 66.
 17. Dianne Bell as cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [223].
 18. Occasionally a child is betrothed prior to its birth. See Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 334.

between the girl's family and the prospective husband. As mentioned above, a girl would usually be betrothed as an infant or young child, sometimes to a youth but more often to an older man.¹⁹ Generally gifts are exchanged to establish and maintain the marriage contract until such time as the girl has reached puberty or the families believe that the girl is ready to follow through with confirming the marriage.²⁰ Sometimes the prospective husband has responsibilities such as providing food to the girl's family during the betrothal period, which may be many years.²¹ In other cases the girl may go to live with the prospective husband's clan for a period of time before cohabiting with the husband.²²

The first indication of a confirmed promised marriage in traditional Aboriginal society is the occurrence of public cohabitation whereby the partners to the promised marriage take on all 'marital responsibilities including sexual relations'.²³ Consummation of the marriage is not usually marked with ceremony.²⁴ The final stage of confirmation is the birth of the first child of a traditional marriage. This is considered to strengthen the union between the parties to the marriage.²⁵

Though it is a contract of sorts, a promised marriage is not always absolute; there are ways of avoiding the match. For instance, a betrothal may be broken off and the girl may marry another with the consent of the intended husband.²⁶ It is also possible for a betrothed girl to elope with another man and, provided that the match is accepted within the kinship rules, the intended husband may cede his rights to the girl upon payment of compensation.²⁷ If, however, the marriage had already taken place, there might be the possibility of punishment for one or both of the eloping couple, sometimes resulting in death.²⁸

Recognition of promised marriage contracts

The historical effects of colonisation and past government policy on Aboriginal culture and the increasing urbanisation of Western Australia's Aboriginal population have each led to the erosion of certain cultural practices. The practice of promised marriages appears to be one such custom that has declined in Western Australia; although there were indications that the practice remained current in some remote Aboriginal communities.²⁹ Like the NTLRC inquiry, the Commission found that where arranged marriages still existed there was some degree of choice as to whether the girl would enter the marriage upon reaching puberty.³⁰ However, the Commission received contradictory accounts of the consequences for a girl who chose not to continue with an arranged marriage³¹ and, in these circumstances, the 'choice' might be considered more illusory than real. The NTLRC pointed out in its recent report that there would usually be significant social expectations that a marriage would proceed as arranged and that there might be worrying issues of imbalance of power relationships in promised marriages, particularly where girls under 16 years were matched to adult, and sometimes quite senior, men.³²

The imbalance of power relations, particularly in respect of a young girl's ability to refuse sexual advances in a customary law relationship, is discussed further below under the heading 'Customary Law Promised Marriages and Child Sexual Abuse'.³³ It is important here though to make reference to the lack of consent, at least on behalf of the female, to a promised marriage which is arranged and negotiated between kin. As acknowledged by the ALRC in its report on recognition of Aboriginal customary laws, Australia is under certain

19. Ibid. See also ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [224]. It should be noted that a man was not considered ready for marriage until he had undergone 'a substantial portion of their initiation process' which would often mean that a prospective husband would be in his late twenties. See Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co., 1974) 47.
20. Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 80.
21. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986). See also Berndt RM & Berndt CH, *The World of the First Australians: Aboriginal traditional life, past and present* (Canberra, Aboriginal Studies Press, 5th ed., 1999) 122.
22. Kimm J, *A Fatal Conjunction: Two laws, two cultures* (Sydney: The Federation Press, 2004) 65.
23. Berndt RM, 'Tribal Marriage in a Changing Social Order' (1962) 5 *University of Western Australia Law Review* 326, 339.
24. Ibid 335.
25. Ibid.
26. Ibid 334.
27. Ibid 336.
28. Ibid. See also Berndt RM and Berndt CH, *The World of the First Australians* (Sydney: Lansdowne Press, 2nd ed, 1982) 190–91.
29. Specifically in remote communities in the Pilbara region; Warburton in the Goldfields/Central Desert region; and Wiluna in the Mid-West region.
30. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 23.
31. For instance, some respondents in Wiluna suggested that a woman could reject a promised marriage without reprisal, whilst others indicated that punishment would follow for the girl (and, if she eloped, her new husband) to ensure acceptance back into the community. The extent of such punishment was not revealed.
32. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003) 23.
33. See 'Customary Law Promised Marriages and Child Sexual Abuse', below pp 359–61.

international obligations³⁴ relating to the rights of women to freely choose a spouse and to enter into marriage with full consent and the present state of the law in Australia reflects this position.³⁵ The ALRC therefore recommended against change to the general law to allow recognition or enforcement of a promised marriage contract.³⁶

The Commission agrees with the ALRC that Australia's international obligations preclude the recognition of non-consensual or underage customary law marriage and that any such recognition would result in the denial of fundamental human rights to Aboriginal women and children.³⁷ However, the Commission notes that the mere denial of recognition does little to practically enhance the rights of young Aboriginal girls, who may be the subject of a customary law promise to marry. The matter has been considered more recently by the NTLRC which recommended:

That so far as the concept of 'promised brides' exists in Aboriginal communities, the government sets up a system of consultation and communication with such communities to explain and clarify government policy in this area.³⁸

The Commission proposes that a similar course be taken in Western Australia. The Commission notes that education about the requirement of consent of both parties to a marriage, freedom of choice of marriage partner and the fact that sexual relations with a child under the age of 16 can attract significant criminal sanctions could be readily included in the educative initiatives already planned in response to the Gordon Inquiry. Implementation of the following proposal will also assist Australia to meet its positive obligations under relevant international treaties; in particular the obligation to institute 'preventative measures, including public information and education programs to change attitudes concerning the roles and status of men and women' under the *Convention on the Elimination of All Forms of Discrimination Against Women*.³⁹

Proposal 63

That the Western Australian government include in the educative initiatives planned in response to the Gordon Inquiry, relevant information relating to the requirements under Australian law (and international law) of freedom of choice in marriage partners and the criminality of acts of sexual relations with children under the age of 16 regardless of marriage status under Aboriginal customary law.

Aboriginal Marriage Today

The decline of arranged marriages in Aboriginal society has undoubtedly resulted in more freedom of choice in respect of marriage partner; however, this freedom can have negative implications for the maintenance of Aboriginal culture because marriages more often occur without regard for traditional skin groupings or other marriage rules of relevant clans. Marriages or domestic relationships that disregarded traditional Aboriginal marriage rules were referred to as 'wrong-way' or 'wrong-skin' relationships by those consulted by the Commission during its visits to the regions. Some respondents blamed 'wrong-way' marriages for the breakdown of customary law whilst others suggested that in some cases the knowledge of how to establish an ideal match was in danger of being lost. Certainly many younger Aboriginal people now have limited knowledge of traditional marriage rules and more individuals are marrying (or entering marriage-like relationships) for reasons that have little to do with these rules. According to Buti and Young, the typical Aboriginal marriage today is 'one which has its genesis in a non-marital union that is eventually accepted over time as a marriage by the relevant kin'.⁴⁰ Because such unions do not necessarily observe traditional Aboriginal marriage rules they would not normally be accorded the status of traditional Aboriginal marriages under

34. The *International Covenant on Civil and Political Rights* (Art 23(3)); the *International Covenant on Economic, Social and Cultural Rights* (Art (10(1))); and the *Convention on the Elimination of All Forms of Discrimination Against Women* (Art 16(2)); *Universal Declaration of Human Rights* (Art 16(2)) provide that marriages must be entered into with the free and full consent of the parties and that the betrothal of a child shall have no legal effect. Child marriage may also breach certain provisions of the *Convention of the Rights of the Child*. For further discussion of Australia's international obligations see above, Part IV.

35. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [246]–[253]. See also the discussion in McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project No 94, Background Paper No 9 (February 2005).

36. ALRC, *ibid* [251].

37. In arriving at its decision not to support recognition of non-consensual or underage marriage as a cultural right of Aboriginal peoples, the Commission has been informed by the test propounded by the United Nations Human Rights Committee in *Lovelace v Canada* (HRC 24/77) as discussed in Part IV 'Aboriginal Customary Law in the International Law Context', above pp 67–76.

38. NTLRC, *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003), recommendation 5.

39. United Nations Committee on the Elimination of All Forms of Discrimination Against Women, CEDAW General Recommendation No 19, Art 24(t). It is noted that the Australian Government's National Action Plan *Australia's National Framework for Human Rights* (December 2004) highlights the responsibility of all Australian states and territories in giving domestic effect to international treaties (at 17).

40. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 9.

Australia's international obligations preclude the recognition of non-consensual or underage customary law marriage . . .

customary law but would be recognised under Australian law as de facto relationships.

In those Aboriginal communities where the influence of Christian missionaries has been strong there is more likely to be a higher incidence of marriages solemnised according to the provisions of the *Marriage Act 1961* (Cth).⁴¹ On the other hand, where exposure to white Christian culture has been limited many traditional Aboriginal marriage practices have remained intact and 'right-way' customary law marriages following traditional marriage rules are common. However, these marriages do not satisfy the provisions of the *Marriage Act* and, like 'wrong-way' or non-traditional marriages, these traditional marriages would be considered by current Australian law to be de facto relationships.⁴²

Recognition of Traditional Aboriginal Marriage

As mentioned earlier, all matters having a connection to marriage (including the dissolution of a marriage) are within the Commonwealth's legislative jurisdiction. In 1986 the ALRC, reporting to the Commonwealth government, identified four ways in which traditional Aboriginal marriage could be recognised:

- by enforcing traditional marriage rules under Australian law;
- by categorical recognition of traditional marriage as a lawful marriage under the *Marriage Act 1961* (Cth);
- by equating a traditional marriage to a de facto relationship under Australian law; and
- by functional recognition of traditional marriage for particular purposes.⁴³

The first method of recognition, that of enforcement of traditional marriage rules, has been dealt with above

under the heading 'Recognition of promised marriage contracts'.⁴⁴ The second method has not been considered by the Commission as it is not within Western Australia's legislative capacity to redefine 'marriage' under Australian law. The last two methods of recognition do fall into Western Australia's legislative capacity and are therefore considered below.

Recognition of traditional Aboriginal marriage as a de facto relationship

One way of extending the legal benefits of marital status under Australian law to traditional Aboriginal marriages is to recognise them as de facto relationships. Recent amendments to the *Family Court Act 1997* (WA) have given most separating de facto couples in Western Australia access to remedies similar to those for married couples in regard to spousal maintenance and division of property.⁴⁵ It has been noted that the same is not necessarily true of other Australian jurisdictions where there is considerable variation in laws relating to the status of de facto relationships and the rights of separating de facto couples.⁴⁶ What this means for traditional Aboriginal marriages in Western Australia is that the present state of the law can provide clear, equitable resolutions to the problems that follow breakdown of traditional marriages that meet the requirements of a de facto relationship.

In Western Australia the term 'de facto relationship' is defined as a relationship (other than a legal marriage) between two persons who live in a marriage-like relationship.⁴⁷ In determining whether a de facto relationship exists the following factors are relevant:

- the length of the relationship;
- the fact of cohabitation;
- the existence of a sexual relationship;

41. Robert Tonkinson writes of the first Christian marriage of an Aboriginal couple in Jigalong (then a Christian mission camp) in July 1964. See Tonkinson R, *The Jigalong Mob: Aboriginal victors of the desert crusade* (California: Cummings Publishing Co, 1974) 38. It has been reported that 85 per cent of Aboriginal people in the Kimberley now identify as Christian. See *Mission Accomplished*, SBS Video, 1997, as cited in Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 31.

42. Wilkinson D, 'Marrying Law and Custom: The Commonwealth's power to recognise customary law marriages' (1995) 20 (1) *Alternative Law Journal* 23, 23.

43. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) ch 13.

44. See above pp 333–34.

45. Child support for ex-nuptial children of a de facto union is covered by the *Child Support (Adoption of Laws) Act 1990* (WA) which adopts the Commonwealth administrative scheme of child support assessment.

46. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 21.

47. *Interpretation Act 1984* (WA) s 13A(1).

- the degree of financial dependence/interdependence and any agreements for financial support between the parties;
- the ownership, use and acquisition of property;
- the degree of mutual commitment to a shared life;
- whether the parties care for and support children; and
- the reputation of the parties and public aspects of their relationship.⁴⁸

The definition of de facto relationship offered under s 13A of the *Interpretation Act 1984* (WA) is very broad and expressly includes same-sex couples and couples where one or both partners is simultaneously lawfully married to another person. The current definition does not expressly recognise traditional Aboriginal marriage as equivalent to a de facto relationship under Western Australian law; however, it would appear to cover the typical features of such a marriage and therefore offer the same protection.⁴⁹ To ensure that traditional marriages were accorded the same status as de facto relationships under Western Australian law, it would be open to the Western Australian government to amend the Interpretation Act to provide for express recognition of traditional Aboriginal marriage as a de facto relationship.

However, where such an approach has been investigated in the past, Aboriginal people have expressed the fundamental objection that to treat a traditional marriage as a mere de facto relationship would significantly degrade the traditional status and dignity of the union. Acknowledging this objection the ALRC concluded in its 1986 report that:

To treat a traditional marriage as a de facto relationship is to deny recognition of what it purports to be. It is true that Aborigines enter into de facto relationships. But some Aborigines enter into traditional marriages, recognised by themselves and others as distinctive, socially-sanctioned arrangements. If possible these should be specifically recognised, thus maintaining rather than eroding a distinction Aborigines themselves are concerned to maintain.⁵⁰

At the time the ALRC examined this issue the status of de facto relationships and the protection accorded

to separating de facto spouses was of a very different order to the status and protection accorded to married couples. Despite the fact that Western Australian laws now offer similar protection to spouses in de facto unions as to spouses in lawful marriages, the Commission agrees with the ALRC that an approach according traditional marriages the same status as de facto relationships would be undesirable and would deny their legal reality in customary law.⁵¹

Functional recognition of traditional Aboriginal marriage

The course recommended by the ALRC was functional recognition of traditional marriage for particular purposes under Australian law (or in the present case, Western Australian law). Functional recognition involves an examination of the specific legal and social problems that can arise from the failure to recognise traditional Aboriginal marriage as a lawful marriage to ensure that, wherever possible, the benefits, obligations or protections that lawful marriage attracts under Western Australian law are also extended to traditional marriage.

Functional recognition was considered by the ALRC to be the 'least intrusive way of recognising Aboriginal traditional marriages'.⁵² In the ALRC's words:

It does not require codification or enactment of traditional marriage rules, and it thus provides freedom to develop rules to cope with new situations ... It is a recognition, even if indirect, of important aspects of the Aboriginal social fabric and of customary laws, and it makes provision for Aboriginal spouses which ought to be made.⁵³

The concept of functional recognition endorsed by the ALRC also has the advantage that it can avoid the recognition or enforcement of aspects of traditional marriage (such as underage marriage) that may infringe basic rights or international obligations. Another benefit is that functional recognition can recognise traditional marriages that are actually or potentially polygamous,⁵⁴ providing protection for all partners of a marriage.

It is not known to what extent polygamy is practised in Western Australian Aboriginal communities today and the Commission did not receive any submissions on this

48. *Interpretation Act 1984* (WA) s 13A(2) as paraphrased in Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 21.

49. Buti & Young, *ibid* 26.

50. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [245].

51. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 27.

52. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [257].

53. *Ibid*.

54. That is, where a man has more than one wife under traditional law, usually of varying ages. *Ibid* [258]–[260].

To treat a traditional marriage as a mere de facto relationship would significantly degrade the traditional status and dignity of the union.

issue during its community consultations. However, it is noted that in its recent report on Aboriginal customary law the NTLRC saw fit to suggest the review of legislation and administrative policy and procedure to take account of traditional Aboriginal polygamous marriages.⁵⁵ The Commission therefore seeks submissions on this matter. In particular, the Commission is interested to hear of the potential of polygamous marriage practices in Aboriginal communities that span the borders of Western Australia and South Australia or the Northern Territory. The Commission is keen to avoid, where possible, any discrimination resulting from different laws in neighbouring jurisdictions.

Invitation to Submit 13

The Commission invites submissions on the extent to which polygamy is practised in Western Australian Aboriginal communities and the need for recognition of traditional Aboriginal polygamous marriages for particular purposes under Western Australian law.

Defining Traditional Aboriginal Marriage for the Purposes of Recognition in Western Australia

The Commission has examined current Western Australian legislation that provides for certain benefits, protections and obligations that accrue to partners of a lawful marriage or to partners in a de facto relationship. Such matters range from spousal compellability to give evidence to the ability to apply for entitlements on the death of an intestate partner. The Commission has considered the potential of legal and social problems that may arise from the failure to recognise traditional Aboriginal marriage for the purpose of Western Australian laws and has concluded that explicit

recognition of Aboriginal traditional marriage would be desirable.

In considering the form of words to define a traditional Aboriginal marriage for the purposes of recognition in Western Australian written laws, the Commission has had reference to the matters discussed above in regard to traditional marriage rules, to the statutory formula provided by the ALRC in its report on the recognition of Aboriginal customary laws⁵⁶ and to the definitions provided in the laws of other jurisdictions.⁵⁷ The Commission has formulated the following as a proposed definition of traditional Aboriginal marriage to be inserted into the *Interpretation Act 1984* (WA).

Proposal 64

That the following term be added to the *Interpretation Act 1984* (WA):

5. 'Definitions applicable to written laws'

'Traditional Aboriginal marriage' means a relationship between two Aboriginal persons, over the age of 18 years, who are married according to the customs and traditions of the particular community of Aboriginals with which either person identifies.

Proposal 65

That the following section be inserted into the *Interpretation Act 1984* (WA):

13B. Definitions of certain domestic relationships

- (1) A reference in a written law to 'spouse', 'husband', 'wife', 'widow' and 'widower' will be taken to include the corresponding partner of a traditional Aboriginal marriage.
- (2) Section 13B(1) does not apply to the *Family Court Act 1997* (WA).

55. NTLRC, *Legal Recognition of Aboriginal Customary Law*, Background Paper No 3 (2003) 18.

56. See Draft Aboriginal Customary Laws (Recognition) Bill 1986 s 10: ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Appendix A.

57. For example, the *Family Provision Act 1980* (NT) s 7(1A) (now repealed); the *Interpretation Act 1980* (NT) s 19A; *Adoption Act 1988* (SA) s 4(3); *Safety and Rehabilitation and Compensation Act 1988* (Cth) s 4.

Spousal Maintenance and Property Settlement

Because the Commonwealth has already legislated on matters of spousal maintenance and property settlement in relation to marriage, Western Australia has no jurisdiction to effect change in this area to accommodate such matters in respect of Aboriginal traditional marriages. For this reason the above definition of traditional Aboriginal marriage has been held not to apply to the *Family Court Act 1997* (WA) for which the Commonwealth definition of 'marriage'—that is, a lawful marriage under the *Marriage Act 1961* (Cth)—otherwise applies. However, as mentioned above, Western Australia does possess jurisdiction to deal with spousal maintenance and division of property upon the breakdown of a de facto relationship. In this respect, the 2002 amendments to the *Family Court Act* have provided for the availability of remedies to separating de facto couples that are of a very similar nature to those provided for married couples.



It was mentioned earlier that the Commission accepts the fundamental objection raised by Aboriginal people (and acknowledged by the ALRC) to equating a traditional marriage with the status of a de facto relationship under Australian law. However, for the purposes of spousal maintenance and property distribution upon the dissolution of a traditional marriage, the ALRC recommended that the general law, including the law of de facto relationships, apply.⁵⁸ In this regard, the Commission is mindful that because traditional Aboriginal marriage is not explicitly recognised in s 13A of the *Interpretation Act*,⁵⁹ a couple the subject of such a union might, in rare circumstances, be denied the remedies available to separating de facto couples under the *Family Court Act*. This is because the *Family Court Act* only applies to de facto unions which have been in existence for at least two years (unless there is a child of the union or other specified circumstances exist).⁶⁰

This position may be remedied by amending the *Family Court Act* to expressly ensure that traditional Aboriginal marriage be recognised for the purposes of spousal maintenance and property distribution under Part 5A only of the *Family Court Act*. It is important to note that the term 'traditional Aboriginal marriage' used in the following proposed amendment would take the definition accorded by the proposed s 13B to the *Interpretation Act* set out in Proposal 3 (above page 49).

Proposal 66

That s 205U of the *Family Court Act 1997* (WA) be amended to read:

205U. Application of Part generally

- (1) This Part applies to de facto relationships and traditional Aboriginal marriages.
- (2) However, this Part does not apply to a de facto relationship or traditional Aboriginal marriage that ended before the commencement of this Part.
- (3) This Part does not authorise anything that would otherwise be unlawful.

58. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [290].

59. Section 13A defines 'de facto relationship' for the purposes of all written laws in Western Australia. See above p 336.

60. *Family Court Act 1997* (WA) s 205Z.

Care and Custody of Aboriginal Children

Appreciating Cultural Difference

Aboriginal communities know what is at stake. They know that there is nothing more vital to their dignity, integrity and continued existence than their children.¹

Perhaps more than any other area dealt with in this reference, the policies of governments in relation to the care and custody of Aboriginal children have the potential to negatively impact across generations of Indigenous Western Australians. The experiences of the stolen generation are testament to the ongoing detrimental effects of past policies of removal of Aboriginal children from their families and as a consequence many Aboriginal people are suspicious of government intervention in the areas of child care and custody.

Recent amendments made to child welfare legislation in Western Australia demonstrate that government is today more sensitive to the cultural needs of Aboriginal children; however, certain assumptions reflecting the dominant Western paradigm of family structure and child-rearing practices remain. The proposals that follow seek to address these issues and encourage broader appreciation of the fundamental differences between Aboriginal and non-Aboriginal culture in this important area.

Customary Child-Rearing Practices

As mentioned earlier, kinship systems in Australian Aboriginal societies are constructed differently to those

in Western (or European) societies.² An important difference can be seen in the structure of the basic family unit. In Western societies the model of the 'nuclear' family unit with parental responsibility resting primarily with the biological parents is the dominant norm. In contrast, the family unit in Aboriginal societies is extended with many relatives, and often whole communities, sharing child-rearing responsibilities with the biological parents.³ As a result, child-rearing practices in Aboriginal Australia are not underwritten by the permanence and stability of a single home that is typical of non-Aboriginal Australian families. 'Indigenous culture', John Dewar says, 'sees movement of children, either geographically or between or within kinship groups, as beneficial'.⁴

In recognition of this, the federal government's Family Law Pathways Advisory Group recommended in 2001 that the *Family Law Act 1975* (Cth) be amended to explicitly recognise the 'unique kinship obligations and child-rearing practices of Indigenous culture'.⁵ The Group also recommended that:

[S]ection 60B(2) (which relates to principles underlying a child's right to adequate and proper parenting) should include a new paragraph stating that children of indigenous origins have a right, in community with other members of their group, to enjoy their own culture, profess and practice their own religion, and use their own language.⁶

The Commission supports the recognition of cultural differences between non-Aboriginal and Aboriginal child-rearing practices and extended family networks

1. Lynch P, 'Keeping Them Home: The best interests of Indigenous children and communities in Australia and Canada' (2001) 23 *Sydney Law Review* 501, 519.
2. See especially, Part VI, 'The Role of Kinship in Aboriginal Society', above pp 267–68.
3. New South Wales Law Reform Commission (NSWLRC), *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 36.
4. Dewar J, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 222. In his regional report to the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), Commissioner Patrick Dodson noted reports that the mobility of Aboriginal children in extended families made it difficult to follow-up in relation to schooling issues. RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol 1, 1991) [6.10].
5. Family Law Pathways Advisory Group (Cth), *Out of the Maze – Pathways to the Future for Families Experiencing Separation* ('the Pathways Report') (August 2001) 91, recommendation 22. However, it should be noted that the Commission agrees with the Family Law Council that the recognition of extended family and kinship networks and child-rearing practices of Indigenous culture would be better expressed as a general principle within the *Family Law Act 1975* (Cth) and its Western Australian counterpart, rather than in s 61C as recommended by the Pathways Report. See Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 16–17.
6. The Pathways Report, *ibid*. This recommendation appears to reflect the wording of Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR).

expressed in recommendation 22 of the Family Law Pathways Advisory Group report.⁷ But whilst it is within the state government's power to amend the equivalent provisions of the *Family Court Act 1997* (WA) to implement recommendation 22, it is noted that such an action would result in different provisions for nuptial and ex-nuptial children in Western Australia.⁸ It is also noted that such change would result in different laws applying to ex-nuptial children in Western Australia than in the rest of Australia. In these circumstances the Commission does not recommend unilateral change to the Western Australian Act unless and until the Commonwealth Act is amended. This position also reflects the concerns expressed by Aboriginal people during the Commission's consultations that, where possible, the artificiality of state boundaries not result in different laws for Aboriginal people residing in cross-border communities.

International Obligations

The project's Terms of Reference require the Commission to have regard not only to relevant Commonwealth legislation, but also to Australia's international obligations. When dealing with the rights of children, and particularly of Indigenous children, several international covenants must be acknowledged.⁹

Perhaps the most important of these is the United Nations *Convention on the Rights of the Child* (CROC) ratified by Australia on 17 December 1990. This convention establishes common standards for children throughout the world and sets out the obligations of member states to protect the civil, political, economic and cultural rights of children. CROC is underpinned by the principle, set out in Article 3(1), that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies,

the best interests of the child shall be a primary consideration.

CROC also makes specific reference to the particular rights of Indigenous children. Article 30 states that:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her culture, to profess and practise his or her own religion, or to use his or her own language.¹⁰

Where a child cannot remain, for reasons in the child's best interests, in the family home, CROC directs state parties to have regard to 'continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background'¹¹ in considering options for placement of the child. Additionally, CROC's preamble stresses 'the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. The New South Wales Law Reform Commission (NSWLRC) considers that this obliges Australian authorities to ensure that all decisions made in relation to the welfare of Indigenous children are made with reference to the child's cultural context.¹²

Other relevant international instruments are the *International Convention on Civil and Political Rights*, which recognises the rights of ethnic minorities to enjoy their own culture, and the *United Nations Draft Declaration on the Rights of Indigenous People*, which although currently not binding in international law arguably has some degree of moral force in Australia.¹³ The Draft Declaration refers specifically to the removal of Indigenous children from their families and communities in Article 6 suggesting that such removal 'under any pretext' should not be permitted. This has implications for the placement of Indigenous children under Western Australian adoption and child welfare laws.

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7. The Commission also acknowledges the recent review of recommendation 22 conducted by the Family Law Council which, whilst agreeing with the Pathways Report recommendation in principle, qualifies the wording to take account of the practical application of the potential amendments. The Commission finds nothing objectionable in the Family Law Council's treatment of recommendation 22. See Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 16–17.
 8. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 34.
 9. According to the High Court in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 the ratification of international instruments creates a legitimate expectation that administrative decision-makers will have regard to relevant ratified instruments in making their decisions. The Commonwealth government has attempted on several occasions to defeat the effects of *Teoh* but in each case, the Bill has lapsed. See discussion in Part IV, above p 69.
 10. This provision echoes Article 27 of the ICCPR.
 11. *Convention on the Rights of the Child*, Article 20.
 12. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 163.
 13. *Ibid* 174.

The experiences of the stolen generation have shown that the removal of Aboriginal children from their families can cause ongoing psychological trauma.

Aboriginal Child Custody Issues

Aboriginal child custody issues may arise in relation to adoption, foster care or short-term placement and custody or parenting disputes upon the dissolution of a marriage or de facto relationship. In Western Australia, each of these custody issues is governed by separate legislation. Before examining each custody issue in turn, it is necessary to refer to the guiding principles which ideally should inform all custody issues in relation to Aboriginal children.

Guiding Principles

The Aboriginal Child Placement Principle

The Aboriginal Child Placement Principle was formulated in the late 1970s by Aboriginal child welfare agencies that were concerned at the number of Aboriginal children in the care of non-Aboriginal families.¹⁴ The Principle essentially outlines an order of preference for the placement of Aboriginal children outside of their immediate family. The order of preference is generally expressed to be:

- within the child's extended family;
- within the child's Aboriginal community; and, failing that,
- with other Aboriginal people.¹⁵

The Principle was first adopted by government in 1980 when the Commonwealth Department of Aboriginal Affairs published policy guidelines for the adoption and fostering of Indigenous children.¹⁶ However, this statement of principle had limited effect because adoption and fostering remained the preserve of state and territory governments. In its 1986 report on Aboriginal customary laws the ALRC recommended that state and territory legislation dealing with the placement

of children should provide expressly that in relation to the placement of Aboriginal children

preference should be given, in the absence of good cause to the contrary, to placements with (1) a parent; (2) a member of the child's extended family; (3) other members of the child's community (and in particular, persons with responsibilities for the child under the customary laws of that community).¹⁷

In the same year, the social welfare Ministers of each state and territory agreed to implement the Aboriginal Child Placement Principle as policy.¹⁸ At various stages over the years following the Principle was adopted in legislative form by the states and territories with Western Australia being the last state to legislatively implement the Aboriginal Child Placement Principle in 2002–2004.¹⁹ The legislative form of the Principle varies from jurisdiction to jurisdiction but each form shares the objective of maintaining an Aboriginal child's cultural connection with its Aboriginal community. The experiences of the stolen generation have shown that the removal of Aboriginal children from their families can cause ongoing psychological trauma. The recent enactment of the Principle in relevant Western Australian legislation will ultimately assist in reducing such trauma by ensuring that as close as possible connection to a child's culture is maintained where there is no option but to remove a child from its family. The Principle has drawn broad support from Aboriginal communities, as evidenced in the Commission's consultations.²⁰

The 'best interests of the child' principle

In all child welfare and custody legislation the principle of the 'best interests of the child' is the paramount, or at least a primary, consideration. The best interests principle is the guiding principle of CROC and is set out above under the heading 'International Obligations'.²¹

14. Ibid 55–56.

15. Ibid 50.

16. Ibid 59.

17. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [366]. The ALRC also recommended that the Commonwealth legislate to enshrine the Principle.

18. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 62.

19. Although it is noted that in relation to foster care arrangements in Western Australia the Principle has been in place as departmental policy since 1984.

20. See, for instance, LRCWA, Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 11.

21. See above p 340.

However, the best interests of an Aboriginal child may be quite different to those of a non-Aboriginal child and the application of the principle must be informed by relevant cultural considerations.

In relation to determining the best interests of an Aboriginal child Australian courts²² have suggested that regard may be had to:

- the Aboriginal origins of the child;
- the difficulties encountered by part-Aboriginal children in integrating into the society of a European parent after marriage breakdown;
- the custodial parent's attitude to the child's Aboriginal background;
- the effect of loss of contact with the Aboriginal parent's traditions and culture; the extended family support that may be available to a child in an Aboriginal community;
- the difference in attitudes between the Aboriginal and non-Aboriginal communities where relevant to the child's situation;
- the racial prejudice a child may suffer;
- whether the child will be brought up in an atmosphere of racial tension;
- the extent of discrimination the child may be subject to in a particular situation;
- identity problems Aboriginal children may suffer when raised in European society;
- evidence relating to the experience of Aboriginal children in non-Aboriginal environments;
- health and hygiene factors in a particular location; and
- the disadvantages of not placing a child with his or her community, including (a) loss of relations with a broad range of kin who would otherwise assist with social relations and economic interactions and provide emotional and physical support, educative knowledge and spiritual training; (b) loss of knowledge stemming from these social interactions; and (c) ambiguities in or loss of identity with kin and country.²³

Because the best interests principle is subjectively applied by administrative decision-makers (and, in relation to court custody proceedings, by judges) attention must be paid to the process of application to avoid ethnocentrism. For example, Dewar has noted that the 'child-rearing practices regarded as normal and desirable in Indigenous society may be considered aberrant and harmful by dominant conceptions of children's best interests'.²⁴ The involvement of Aboriginal people and Aboriginal organisations in cases involving the placement of an Aboriginal child is therefore considered imperative in order to avoid ethnocentric assumptions unnecessarily colouring the decision-making process.²⁵

Adoption

Adoption is the absolute transfer of legal rights to parenting and usually severs all ties with a child's natural family. Adoption is said to be alien to Aboriginal societies,²⁶ primarily because the extended nature of Aboriginal families precludes the need for adoption.²⁷ As Carol Martin MLA said during the parliamentary debates for the 2002 amendments to the *Adoption Act 1994* (WA):

Adoption for Aboriginal people does not work and is not part of our culture. It is not what our kids need. If something happened to me, I have 20 sisters—they may not be biological sisters—who have the same role and responsibility for my children as I do for their children. There is therefore no place for adoption where I come from. Our kids have a place and there has always been a place for them.²⁸

The NSWLRC has reported that there is no clear view amongst Aboriginal people about whether adoption should ever be contemplated for Aboriginal children.²⁹ Although birth-parents of Aboriginal children must have the same access to the alternative of adoption as those of non-Aboriginal children, the very few adoptions of Aboriginal children in Western Australia each year suggest that better options might be available.³⁰

22. The primary cases in this regard are: *In the Marriage of B and R* (1995) 127 Federal Law Review 438; *In the Marriage of Goudge* (1984) 54 ALR 514; *Fv Langshaw* (1983) 8 FamLR 833; *In the Marriage of Sanders* (1976) 10 ALR 604; and *Re CP* (1997) 137 Federal Law Review 367.

23. 'Relevant factors: Best interests in the Aboriginal context', *LexisNexis Online*, [5-3965], <<http://www.lexisnexis.com>> (footnotes omitted). See also the discussion in Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 11–13.

24. Dewar J, 'Indigenous Children and Family Law' (1997) 19 *Adelaide Law Review* 217, 230.

25. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 208–213.

26. *Ibid* 36.

27. This is not the case for Torres Strait Islander families where adoption is recognised as a common customary practice. See Ban P, 'Developments in the Legal Recognition of Torres Strait Islander Customary Adoption' (1996) 78 (3) *Aboriginal Law Bulletin* 14–15.

28. Western Australia, *Parliamentary Debates*, Legislative Assembly, 16 October 2002, 1872 (Mrs Carol Martin). Mrs Martin is an Indigenous member of the Western Australian Parliament.

29. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 37.

30. According to the Department of Community Development Adoption Services there was only one adoption of an Indigenous child in Western Australia in 2002/2003 and none in 2003/2004. Statistics show that Indigenous adoptions in Western Australia have been fairly steady at between zero and two per year since 1990: NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 157.



Indeed, in practice, after the requisite counselling and investigation of options, most birth-parents considering adoption for their Aboriginal child find alternative placement for the child, often in the child's extended family.³¹ In these circumstances, while the primary care and responsibility of the child will lie with another, legal guardianship of the child remains with the child's biological parents.

Adoption Act 1994

Despite the very few adoptions of Aboriginal children recorded each year, the recent legislative enactment of the Aboriginal Child Placement Principle within the *Adoption Act 1994* (WA) (the Act) is considered by the Commission to be an important advance. Schedule 2A of the Act provides:

Aboriginal and Torres Strait Islander children – placement for adoption principle

The objective of this principle is to maintain a connection with family and culture for children who are Aboriginal persons or Torres Strait Islanders and who are to be placed with a person or persons with a view to adoption by the person or persons.

If there is no appropriate alternative to adoption for the child, the placement of the child for adoption is to be considered in the following order of priority.

1. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander in the child's community in accordance with local customary practice.
2. The child be placed with a person who is an Aboriginal person or a Torres Strait Islander.
3. The child be placed with a person who is not an Aboriginal person or a Torres Strait Islander but who is sensitive to the needs of the child and capable of promoting the child's ongoing affiliation with the child's culture, and where possible, family.

The Commission notes that the reference in the context of adoption to placement of a child 'in accordance with local customary practice' may be redundant given that adoption has no place in traditional Aboriginal society. However, in the circumstances of the express acknowledgment in s 3(2) that 'adoption is not part of Aboriginal ... culture and that therefore the adoption of a child who is an Aboriginal person ... should occur only in circumstances where there is no other appropriate alternative for that child', the Commission considers that the meaning of the phrase 'in accordance with customary practice' must refer to the customary practice of alternative child placement within the child's kinship group rather than relinquishment of legal parental rights by adoption.³²

The Act also provides in s 16A that the Director-General must consult with an Indigenous child welfare agency regarding the prospective adoption of an Indigenous child and for an Indigenous officer of the Department to be 'involved at all relevant times in the adoption process' of an Indigenous child. The importance of such consultation in regard to the placement of an Indigenous child, particularly in determining the best interests of such a child, is emphasised above. However, the Commission considers it equally important that consultation be had with the child's extended family or community, especially in light of the need to establish 'local customary practice' in application of the Aboriginal Child Placement Principle under the Act. The Commission therefore proposes the following amendment to Schedule 2A of the Act.

Proposal 67

That following clause 3 of Schedule 2A of the *Adoption Act 1994* (WA) a new paragraph be added:

In applying this principle all reasonable efforts must be made to establish the customary practice of the child's community in regard to child placement. In particular, consultations should be had with the child's extended family and community to ensure that, where possible, a placement is made with Aboriginal people who have the correct kin relationship with the child in accordance with Aboriginal customary law.

31. According to the Department of Community Development Adoption Services.

32. It is perhaps important to note with respect to customary practice of child placement that the equivalent provision of the *Adoption of Children Act 1994* (NT) makes clear that where a child cannot be placed within its own extended family then the child should, as the next preferred alternative, be placed 'with Aboriginal people who have the correct relationship with the child in accordance with Aboriginal customary law'. See *Adoption of Children Act 1994* (NT) s 11(1).

Foster Care and Alternative Child Welfare Placement

Similar to the process for adoption, the process for foster care or alternative placement of children in Western Australia has recently been reviewed. The recently enacted *Children and Community Services Act 2004* (WA) (the CCS Act), which provides for the protection and care of children,³³ was established partly in response to the findings of the Gordon Inquiry which reported serious abuse and neglect of children in some Aboriginal communities. It also repeals the *Child Welfare Act 1947* (WA) the *Welfare and Assistance Act 1961* (WA) and the *Community Services Act 1972* (WA) which were considered outdated and did not adequately reflect best practice or current research in relation to the care and protection of children.³⁴

The CCS Act provides for a number of different types of protection orders³⁵ and for placement arrangements at the behest of parents where parents cannot adequately provide for their children.³⁶ Division 3 of the CCS Act embraces the Aboriginal Child Placement Principle in relation to arrangements made for the care and protection of Indigenous children.³⁷ The need for such clear statement of principle is not academic. As at June 2004 there were 660 Aboriginal children in care in Western Australia. Of these, 569 were placed in the care of relatives, Aboriginal carers or placement services with Indigenous carers and 91 were placed with non-Aboriginal carers.³⁸ At 13.8 per cent, the amount of Aboriginal children placed with non-Aboriginal carers is still significant; however, as with adoption, the principle of the best interests of the child is the paramount consideration governing the placement of a child under care and protection legislation. In this respect it is important to note that placement within a child's community may not, in some circumstances, be in the best interests of a particular child. The NSWLRC has noted that:



A child also has the right to be protected from all forms of abuse. Often protective mechanisms exist within Aboriginal communities through the positive intervention of the extended family. However, in some extended families these mechanisms may have broken down due to the levels of domestic violence and drug and alcohol abuse. In some Aboriginal communities the level of alcoholism, domestic violence and abuse may mean that there are no appropriate placements available for Aboriginal children in need of care. In such instances other options would need to be explored, such as Aboriginal group homes. A placement with a non-Aboriginal family which is supportive on contact with the Aboriginal community may be an appropriate option, but only after all other options have been exhausted.³⁹

While the CCS Act makes considerable and appropriate provision for the processes and principles relating to care and protection orders for Aboriginal children, at the time of writing the relevant provisions of the CCS Act had not been proclaimed. The Commission understands that proclamation will follow as soon as the regulations and guidelines associated with the new Act are settled and that this is projected for early 2006. The care and protection of children in Western Australia therefore continues at this time to be governed by the *Child Welfare Act 1947*. Whilst that Act does not make legislative reference to the Aboriginal Child Placement Principle it is embraced in departmental

33. The Act also makes provisions in relation to the employment of children and the operation of child-care services.

34. Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2003, 14244 (Ms SM McHale).

35. Ranging from supervision and time limited orders to enduring parental responsibility orders and orders giving the CEO of the Department parental responsibility for the child until the age of 18. See *Children and Community Services Act 2004* (WA) Division 3. Protection orders are applied to ensure the welfare of a child where the child is found to have suffered or is likely to suffer abuse, harm or neglect or where the child's parents have been incapacitated or have died or have abandoned the child: *Children and Community Services Act 2004* (WA) s 28.

36. In such circumstances the parents retain legal parental responsibility for the child. Such arrangements will only, however, be made in cases where no protection issues exist.

37. Provision is also made for consultation with an Aboriginal child welfare agency and the involvement at all stages of an Indigenous case officer in cases involving placement of an Indigenous child. See *Children and Community Services Act 2004* (WA) s 81.

38. Western Australia, *Parliamentary Debates*, Legislative Assembly, 27 August 2004, 5807 (Ms Ljiljanna Ravlich).

39. NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) 169–70 (footnotes omitted). The inability of some communities to care for children was also noted by Indigenous respondents to the Commission's consultations in the Pilbara. In the Commission's Thematic Summary for the Pilbara consultations it was noted that '[r]eference was made to the conditions of drunkenness, drugs and offending in town from which people in the community would wish to remove children or grandchildren. However, the European system did not support such removal'.

policy⁴⁰ and applied as a strict guide to practice in all dealings with Aboriginal children requiring the care and protection of the state.

Nonetheless, government practices of child welfare placement were criticised by Aboriginal people during the Commission's consultations.⁴¹ In particular the Commission's consultations in the Pilbara region recorded that:

There was a problem where children had left dysfunctional parents, of a lack of clarity as to who now had responsibility for them. Many children were left to wander the streets without any other adults clearly responsible for them. Something was needed that would not resort to interventionist custodial arrangements, on the one hand, or to a simple hands off position, on the other. Times have changed from the days when the state always intervened and took kids away. Families now take on additional burdens of care. There needs to be clear protocols in place for the placement of Indigenous children, there are 'too many orphans in this community' and white men 'just take stabs in the dark' when it comes to placing children. Aboriginal people need to be consulted more about family issues.⁴²

It was also noted that the 'Department of Community Development does not know whole family networks or how placement of children may put a burden on one person'⁴³ and that the laws relating to care arrangements 'involve too much paperwork and insufficient support [including financial support] for Aboriginal people'.⁴⁴ In this regard it is important to note that extended family relationships in Aboriginal society impose significant cultural obligations on family members to care for others. In these circumstances family members approached by the Department to provide care for a child who is the subject of a protection order may find it difficult to refuse such a request, even if they clearly do not have the necessary financial, physical and emotional resources to take care of the child.

The comments of Aboriginal people consulted for this reference suggest that the current child welfare system

does not always work to the benefit of Aboriginal children or their carers. It is true that some of the criticisms reported to the Commission may originate from carers of children who are not the subject of a protection order but who have been removed from parents by family intervention. In these cases it is possible that the Department is not aware of the private care arrangements and is therefore unable to offer support and assistance to these carers. Certainly many extended family carers, in particular grandparents, reported the lack of financial assistance to aid the upbringing of children in their care.⁴⁵

It is important that the Department of Community Development recognise the role that the extended family play in the care of Aboriginal children and that often care arrangements for children in need of protection are made through private family intervention. It is clear from the above that there is insufficient communication by the Department of the support services and benefits available for extended family carers of Aboriginal children. Endeavours should be made to ensure that such information is made readily available to Aboriginal communities so that all primary carers (regardless of whether the care arrangements are made by the Department or privately) are aware of the services in place to assist them in caring for children.

Proposal 68

Recognising the custom in Aboriginal communities of making private arrangements to place a child in the care of members of the child's extended family where necessary for the proper care and protection of the child, the Department of Community Development should make available to Aboriginal communities information regarding support services and government benefits (whether Commonwealth or state) to assist extended family carers.

40. See Department of Family and Children's Services (WA), 'Substitute Care Policy in Relation to Aboriginal Child Placement' (1984); reproduced in NSWLRC, *The Aboriginal Child Placement Principle*, Research Report No 7 (March 1997) Appendix 1.

41. The Commission also acknowledges criticisms of the Western Australian child welfare system heard by the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families. See *Bringing Them Home* (April 1997) ch 20.

42. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara* (6–11 April 2003) 18.

43. *Ibid.*

44. *Ibid.*

45. At a number of consultations it was said that mothers who had relinquished the care of their children (most likely through private arrangements) to grandparents, sisters or aunts still retained the single mother's allowance or Family Tax Benefits awarded by Centrelink. This was said to be a particular issue for grandparents, who have key responsibilities in relation to the care of grandchildren in Aboriginal families. It is noted that payments may be made to carers under the CCS Act and that certain federal government benefits are available to those who have the day-to-day care of a child not the subject of a protection order through Centrelink. However, according to Centrelink such assistance is generally not available if a parent of the child lives in the same house as the carer. In Aboriginal communities extended families often live together and carers may well be disadvantaged if payments are not made directly to them.

Family Court Custody Disputes

The Family Court of Western Australia

As mentioned earlier, Western Australia has established its own discrete Family Court exercising joint jurisdiction under the Commonwealth *Family Law Act 1975* (in relation to the dissolution of marriages, spousal maintenance and property disputes, and custody of children the subject of a marriage) and the Western Australian *Family Court Act 1997* (in relation to spousal maintenance or property disputes upon the dissolution of de facto relationships and custody or parenting orders in respect of ex-nuptial children).

Background Paper No 4 to this reference discusses a number of issues in relation to family law and Aboriginal customary law. In that paper Buti and Young note that current Family Court processes negatively affect Aboriginal people in a number of ways, including:

- the failure to accept oral testimony in certain circumstances;⁴⁶
- the failure to make provision for Aboriginal avoidance protocols under customary law;⁴⁷
- inadequate provision of interpreters where culture or language presents a barrier for a party;⁴⁸
- inadequate provision of culturally appropriate services to Aboriginal clients;⁴⁹
- the lack of recorded Family Court data on Indigenous family disputes;⁵⁰
- the lack of Aboriginal counsellors in the Family Court Mediation and Counselling Service;⁵¹ and
- the lack of Aboriginal alternative dispute resolution services for family court matters.⁵²

Many of these matters were also raised by participants in the Commission's community consultations. These issues are not, however, confined to Western Australia. The Commonwealth's Family Law Pathways Advisory

Group recommended various ways of expanding culturally appropriate service delivery in the family law system, including enhanced cultural training for all staff; the development of an Indigenous employment strategy; the provision of interpreters; the sponsoring of local level Indigenous community networks; the development of an Indigenous family law database and facilitation of research into Aboriginal customary law and family issues; and the development, in partnership with Indigenous communities, of narrative therapy and Indigenous family law conferencing to enhance family dispute resolution.⁵³ Such focus on alternative dispute resolution is particularly crucial in Western Australia where the new *Family Law Rules 2004* (WA) compel families to participate in primary dispute resolution such as 'negotiation, conciliation, mediation, arbitration and counselling'⁵⁴ prior to commencing court procedures. In these circumstances, the lack of culturally appropriate dispute resolution services for Aboriginal clients represents a significant problem.

The Commission considers that the government can do more to meet the needs of Aboriginal clients in the Family Court of Western Australia. In this regard the Commission supports Recommendation 23 of the Family Law Pathways Advisory Group and proposes that the Western Australian government seek federal funding in whole or in part for its immediate implementation in the Family Court of Western Australia.

Proposal 69

That the Western Australian government take immediate steps to implement Recommendation 23 of the Family Law Pathways Advisory Group's Report *Out of the Maze – Pathways to the Future for Families Experiencing Separation* to enhance culturally appropriate service delivery to Aboriginal clients of the Family Court of Western Australia.

46. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 35.

47. Ibid 36. In particular, in respect of cross-examination of evidence where a mother-in-law and son-in-law might be in the court at the same time. Buti and Young suggest that where avoidance protocols are in issue provision should be made for the relevant parties to hear witness evidence electronically.

48. Ibid. Aboriginal respondents at the Mirrabooka consultation suggest the right of a party to request that a significant other in the form of an Elder or Aboriginal lawperson be permitted to attend Family Court hearings and advocate where necessary.

49. Ibid.

50. Ibid. Buti and Young note that the Family Court of Western Australia has recently begun to record such data but that there remains a 'dearth of family law research directed at the problems facing Aboriginal families'.

51. Ibid 37.

52. Ibid.

53. Family Law Pathways Advisory Group (Cth), *Out of the Maze – Pathways to the Future for Families Experiencing Separation* (August 2001) 91, recommendation 23. The full recommendation and accompanying text is reproduced in Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 39.

54. *Family Law Rules 2004* (WA) sch 1, Pt 1.

The Commission considers that the government can do more to meet the needs of Aboriginal clients in the Family Court of Western Australia.

Parenting disputes

During its consultations the Commission found that another area of concern to Aboriginal people in the current family law system is in relation to parenting disputes or disputes in relation to the custody of children.⁵⁵ Where parenting disputes arise and orders are sought to legally transfer parental responsibility for a child (as opposed to an informal arrangement where the care of a child may be given to a family or community member but legal parental responsibility for that child remains with the birth-parents) Aboriginal people may find themselves at a disadvantage. This is because the system does not explicitly recognise the customary practice of extended family placement; instead the Commonwealth and state family law Acts are premised upon the concept of the 'nuclear' family where one or both of the child's parents have parental responsibility for the child.⁵⁶

As Buti and Young note, in the case of a non-Aboriginal family parenting matters are often resolved by consent orders sharing parental responsibility for children between the biological parents. However, where parents of an Aboriginal child wish to obtain court orders to transfer legal care of a child or share parenting responsibilities with another person they cannot do so by consent but must submit to an extended process of counselling and ultimate consideration by the Family Court.⁵⁷ It was observed in the background paper that:

It seems these are not just hypothetical problems. In the Thematic Summary for the Commission's consultations in Kalgoorlie, reference was made to the case of a grandmother caring for her grandchildren. Though the particular circumstances of the case are not clear from the Summary, it was noted that the grandmother '... was not supported by the law and was, in fact, punished by it. This produced

family breakdown and delinquency'. In the Thematic Summary of the Commission's consultations in Laverton, mention was made of the need for the system to automatically recognise the care of a child by an extended family member, as happened in Aboriginal custom.

A similar problem might arise on the death of the parents. In the Thematic Summary for the Commission's consultations in Kalgoorlie, the Aboriginal custom of a maternal uncle taking over the care of nieces or nephews on the death of their parents was noted. This relative would have no standing nor legal rights as a carer in mainstream family law in the absence of a parenting or adoption order. That is, his customary guardianship would not be recognised unless he sought orders to formalise it.⁵⁸

The Family Law Council has recently examined this issue and has highlighted the importance of legal recognition of persons with 'primary parental responsibility' for a child to ascertain whether that person (rather than the biological parents) is entitled to receive applicable tax benefits or child support and to be able to give consent for medical treatment or to enrol a child in school.⁵⁹ The Council recommended that governments (state and federal) create a special legislative procedure for recognition and registration of persons with primary parental responsibility (in particular under relevant customary law) in order to avoid the costly court processes that are currently required to obtain a parenting order.⁶⁰

The Commission strongly supports this recommendation; however, as noted earlier, in the interests of maintaining equality in relation to ex-nuptial and nuptial children in Western Australia, the Commission is unwilling to propose that Western Australia unilaterally amend the *Family Court Act* to establish this procedure unless and until similar

55. Whether of a marriage, a traditional Aboriginal marriage, a de facto relationship or otherwise. See for instance the Commission's thematic summaries of consultations for Kalgoorlie, Laverton and the Pilbara region as well as Manguri in the metropolitan area.

56. This principle is enshrined in the *Family Law Act 1975* (Cth) s 61C and the *Family Court Act 1997* (WA) s 69.

57. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 31. Buti and Young note that 'the obvious intent of this [process] is to avoid de facto 'adoptions' using consent parenting orders (at 32).

58. Ibid 32.

59. Family Law Council, *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices: Response to Recommendation 22 of the Pathways Report* (December 2004) 18.

60. Ibid 18–19. The consent of both biological parents would be required for such an order and consent may be withdrawn at any time.

The Child Support Scheme makes little sense in Aboriginal communities where child-rearing is shared, often between parents and members of the child's extended family.



Child support scheme

The child support scheme (a Commonwealth scheme adopted by Western Australia) sets out a formula for the provision of financial support of a child by its separated biological parents. In their background paper to this reference Buti and Young suggest that the scheme, which is premised on the model of the 'nuclear' family, makes little sense in Aboriginal communities where child-rearing is shared, often between parents and members of the child's extended family.⁶² As a

consequence, carers in the child's extended family often share the financial responsibility for the child without necessarily being able to offset this cost by child support from the relevant biological parent.⁶³

A recent federal government review of the scheme and other child custody issues⁶⁴ indicates that the formula will be revisited in the near future. Buti and Young argue that specific input as to the impact of proposed changes to the scheme on Aboriginal families should be sought before the scheme is revised.⁶⁵ It is noted that, although Western Australia could independently change the formula applied by the Family Court of Western Australia, it could only do so in respect of unmarried couples. In this regard, as noted earlier, the Commission refuses to propose change that would result in inequality based on marital status.

amendments are made to its Commonwealth counterpart. Having said that, it is noted that the state government's acceptance of Proposal 69 of this Discussion Paper implementing Recommendation 23 of the Family Law Pathways Advisory Group's Report would have a significant effect in reducing the disadvantage that Aboriginal people face in relation to securing court orders for the legal transfer of parental responsibilities to members of a child's extended family or kinship group. This is so because the enhancement of education of Family Court magistrates, judges and other staff, and the provision of specialised Aboriginal counselling services within the Family Court of Western Australia will assist in the facilitation of court orders recognising primary carers other than the child's biological parents.⁶¹

61. In this regard the Commission takes heed of ATSIC's submission to the Family Law Council's report on *Recognition of Traditional Aboriginal and Torres Strait Islander Child-Rearing Practices* where it was observed that the Family Court needed to be aware of the complex kinship structures, different child-rearing practices and avoidance rules of the relevant Aboriginal group to make properly informed decisions in relation to the custody of Aboriginal children. Ibid 34.

62. Ibid 40.

63. Although a carer may make a private arrangement for financial support of the child from the child's biological parent without the necessity of engaging the child support scheme through the Family Court: ibid 41.

64. House of Representatives, Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the inquiry into child custody arrangements in the event of family separation* (December, 2003).

65. Buti T & Young L, *Family Law and Customary Law*, LRCWA, Project No 94, Background Paper No 4 (August 2004) 42.

Family Violence and the Protection of Women and Children

Under its Terms of Reference the Commission is required to have regard to all matters of Aboriginal customary law falling within the state legislative jurisdiction, including domestic violence. Domestic violence is defined by the Western Australian Family and Domestic Violence Unit (FDVU) as:

Behaviour which results in physical, sexual and/or psychological damage, forced social isolation, economic deprivation, or behaviour which causes the victim to live in fear.¹

FDVU notes that the term 'family violence' is preferred to the term 'domestic violence' in Indigenous communities because it 'encapsulates not only the extended nature of Indigenous families, but also the context and range of violence in Indigenous communities'.²

The differences between domestic violence in the non-Aboriginal community and its counterpart in the Aboriginal community are significant enough to warrant the distinguishing term 'family violence'. For instance, in contrast to the private or domestic nature of family violence in the non-Aboriginal community, family violence in Aboriginal communities is often played out in the public sphere or in a household with other adult witnesses. In addition, because Aboriginal households often accommodate extended families with a complex web of cultural relations, the perpetrator of family violence may be another family member or relative rather than a spouse or partner (as is usually the case in non-Aboriginal domestic violence).³ There are also increasingly reported cases of 'elder abuse' in Aboriginal communities whereby a family member (sometimes a child or young adult) is physically violent towards a parent or adult relative. Elder abuse also encompasses

psychological abuse, neglect or financial exploitation of elderly relatives, particularly those who may have dementia or diminished decision-making abilities.⁴

Whilst Aboriginal men are also known to be victims of family violence, Aboriginal women and children are disproportionately represented as victims. As a consequence, the following discussion focuses on the position of women and children in Aboriginal families and examines measures for their protection against family violence.

Family Violence in Western Australian Aboriginal Communities

During consultations for this reference, the Commission received a great number of submissions that suggested that family violence was of great concern to Aboriginal communities, and particularly to Aboriginal women. Over the past two decades the escalating problem of interpersonal or family violence in Aboriginal communities has become increasingly apparent. In 1996, research undertaken in Western Australia reported alarming statistics showing that Aboriginal women accounted for just under half of all victims of family violence.⁵ It was further reported that Aboriginal women were 45 times more likely to be the victim of family violence by a spouse or partner than non-Aboriginal women.⁶ The problem appears to be somewhat amplified in regional areas with victimisation rates showing that Aboriginal people are approximately three times more likely to be victims of family violence outside Perth than in the capital city and 40 times more likely to be victims of family violence than their non-Aboriginal neighbours.⁷

1. Family and Domestic Violence Unit (FDVU), *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 5
2. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) 518, as cited in *ibid* 36.
3. Although, it is important to note that in the majority of cases the perpetrator of family violence is an intimate partner of the victim.
4. The Commission is aware of a research project on issues of elder abuse in Indigenous communities currently being undertaken by the Office of the Public Advocate in Western Australia. The Public Advocate has recruited two Aboriginal project officers to conduct consultations and research on this matter throughout the state with a view to isolating culturally-appropriate (and localised) solutions to these issues. The findings of the research are expected to be released in late 2005.
5. Ferrante A, Morgan F, Indermaur D & Harding R, *Measuring the Extent of Domestic Violence* (Sydney: Hawkins Press, 1996) 34.
6. *Ibid*.
7. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 3.57. These data were anecdotally confirmed by the Commission's consultative visits to Aboriginal communities throughout Western Australia.

In 2002 the Gordon Inquiry in Western Australia declared that ‘the statistics paint a frightening picture of what could only be termed an “epidemic” of family violence and child abuse in Aboriginal communities’.⁸ However, it is important to note that because of the high incidence of non-reporting in matters of domestic or family violence, these statistics may be reasonably conservative. Further, there is evidence that Indigenous women and children suffer repeat victimisation of ‘multiple forms of violence and abuse’⁹ such that violence, particularly of the domestic kind, might be at risk of becoming normalised, accepted behaviour in many Indigenous families and communities or that women may see themselves as ‘responsible’ for the violence perpetrated against them.¹⁰ There is also the issue of intergenerational transmission of violent behaviour, which is already proving to be a significant problem and one that will continue the cycle of family violence in Aboriginal communities unless immediately and effectively addressed.

Causes of Aboriginal Family Violence

A detailed literature review undertaken by Harry Blagg in 1999 identified a number of causes for high rates of violence in Aboriginal communities:

- marginalisation and dispossession;
- loss of land and traditional culture;
- breakdown of community kinship systems and Aboriginal law;
- entrenched poverty;
- racism;
- alcohol and drug abuse;
- the effects of institutionalisation and removal policies;
- the ‘redundancy’ of the traditional Aboriginal male

role and status, compensated for by an aggressive assertion of male rights over women and children.¹¹

As Monique Keel suggests in her briefing paper *Family Violence and Sexual Assault in Indigenous Communities*, it is important that these factors be viewed as ‘part of a complex historical picture of disadvantage and oppression rather than as individual, isolated causes of violence’.¹² For instance, there is now abundant research to suggest a significant correlation between alcohol and substance abuse, and family and interpersonal violence in Aboriginal communities.¹³ Indeed, recent reports have suggested that 70 to 90 per cent of assaults in Aboriginal communities are committed by offenders under the influence of alcohol or other drugs.¹⁴ However, when viewed in historical perspective, the problem of alcohol abuse in Indigenous communities shows a much bigger picture as an unwanted effect of colonialism (alcohol having been introduced by European ‘settlers’ and often used as payment in lieu of money)¹⁵ and as both an effect and cyclical cause of generational disadvantage, unemployment and poverty.

As discussed above in Part II,¹⁶ the problem of overcrowding in many Aboriginal households has been recognised as a significant contributing factor to problems of family or interpersonal violence within households. Overcrowded housing creates the context for such violence because, apart from the obvious stresses such living conditions invite, women and children are unable to remove themselves from contact with violent family members. The high incidence of sexual assault of women and children¹⁷ occurring as part of a broader picture of regular family violence in Aboriginal communities demonstrates the need for the provision of ‘safe places’ for women and children. As discussed

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8. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into responses by government agencies to complaints of family violence and child abuse in Aboriginal communities* (July 2002) xxiii (‘the Gordon Inquiry’).
 9. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 12.
 10. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 1–2. This was reported as a significant problem in the Northern Territory, see: Office of Women’s Policy (NT) *Aboriginal Family Violence* (1996) 5, cited in Blagg, *ibid* 9.
 11. Blagg H, *Intervening with Adolescents to Prevent Domestic Violence: Phase 2 the Indigenous rural model* (Canberra: National Crime Prevention Unit, 1999) as cited in Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 5–6. In respect of this last factor it was said by one Aboriginal respondent at the Commission’s consultations that: ‘Men have been severely damaged by dispossession. Women still have a role and a reason to exist, men don’t. Men have cultural identity issues’.
 12. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 8. See also Stanley J, Tomison A & Pocock J, *Child Abuse and Neglect in Indigenous Australian Communities*, Australian Institute of Family Studies, Issues Paper No 19 (2003).
 13. Ministerial Council on Drug Strategy (Cth), *National Drug Strategy Aboriginal and Torres Strait Islander Peoples Complementary Action Plan 2003–2006* (August 2003) 8; Bolger A, *Aboriginal Women and Violence* (Darwin: ANU North Australia Research Unit, 1991).
 14. SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2003* (November 2003) 8.11.
 15. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 8. See also the discussion in Part II ‘Substance Abuse – Alcohol’, above pp 22–26.
 16. See above Part II, ‘Housing and Living Conditions’, above pp 35–39.
 17. See Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 7; Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002).

Overcrowded housing creates the context for violence because . . . women and children are unable to remove themselves from contact with violent family members.

below, following the Gordon Inquiry there has been renewed government commitment to the provision of temporary accommodation for those escaping the effects of family violence; however, the prevention of family violence might also be significantly enhanced by addressing the issue of overcrowding in Aboriginal households.

Child Abuse and Child Sexual Abuse in Western Australian Aboriginal Communities

Like family violence, because of a high level of non-reporting or non-disclosure, the true extent of child abuse and, in particular, child sexual abuse in Aboriginal communities in Western Australia is unknown. However, statistics of substantiated child protection notifications and anecdotal evidence gathered from consultations with communities suggest that the incidence of child abuse (particularly abuse linked to family violence) is sufficiently high to alert governing authorities to a significant problem in need of immediate attention.

The Gordon Inquiry

The Gordon Inquiry, led by Magistrate Sue Gordon, was set up by the state government in 2001 to inquire into the response by government agencies into complaints of family violence and child abuse in Western Australian Aboriginal communities. It was prompted by the coronial inquest into the tragic death of a young Aboriginal girl who had suffered as a victim of child sexual abuse and neglect. Following six months of intensive investigation, the report of the Gordon Inquiry was released. In that report an endemic situation of child abuse in Aboriginal communities was described and the responses to family violence and child abuse were found to be inadequate and in need of urgent reform.

The Gordon Inquiry made 197 recommendations and findings focusing on the services of government agencies that most directly address the problems of family violence and child abuse in Western Australia. Key recommendations included the creation of an independent Children's Commissioner and a Deputy Children's Commissioner (Aboriginal) for the protection of children; the development of cultural awareness programs; the skilling of agency staff and teachers to recognise signs or behaviour that may indicate child abuse; the provision of community-based alternative dispute resolution services and offender programs; changes to the processes of courts, victims' services, counselling services and police services; the establishment of a Child Death Review Team; and improved resourcing of community-based services including a 'one stop shop' where Aboriginal people can access a range of services (supported by specialists) to deal with problems that are linked to family violence and child abuse including substance abuse, parenting skills, and health and welfare services.¹⁸

In respect of the death of the young girl that prompted the Inquiry, it was found that 13 agencies had been involved in the delivery of services to the girl and her family but that these agencies worked in isolation and were often unaware of each other's involvement. This prompted a number of recommendations concerning the implementation of a legislative or policy framework to guide effective collaboration between agencies and the coordination of service delivery.

Western Australia's Response to the Gordon Inquiry

The findings of the Gordon Inquiry have met with a very positive response from government which has moved quickly to introduce means to implement the recommendations of the report. The government's action plan—*Putting People First*—developed in response to the Gordon Inquiry has committed Western

18. A similar community-controlled healing centre offering various services for victims of family violence was proposed by Rowena Lawrie and Winsome Matthews of the NSW Aboriginal Justice Advisory Council. See: Lawrie R and Matthews W 'Holistic Community Justice: A proposed response to family violence in Aboriginal communities' (2002) 25 (1) *UNSW Law Journal*: Forum 228–32.

Australia to a comprehensive long-term strategy to address the problems of family violence and child abuse in Western Australian Aboriginal communities featuring a 'whole-of-government' response and a significant investment of resources'.¹⁹ As mentioned earlier in this paper,²⁰ the term 'whole-of-government' is an over-used term in modern politics. However, if meaningfully applied to the resolution of, and response to, issues in Indigenous communities (as targeted in Proposal 1) the whole-of-government approach could work to significantly reduce the incidence of Indigenous disadvantage, violence and abuse. As the case of the death of the young girl that generated the Gordon Inquiry clearly demonstrates, the need for a coordinated and cooperative response by government agencies, particularly in respect of individual case management, is paramount in addressing the problems of family violence and child abuse in Western Australian Aboriginal communities.

An important means of assessing the government's response to the Gordon Inquiry is the establishment of benchmarks and performance measures and regular reporting on the progress of implementation of recommendations. Achieving real outcomes to these important issues is dependent upon a continued, focused commitment by government.



Addressing Family Violence and Child Abuse in Aboriginal Communities

The Need for Culturally Appropriate Responses

According to FDVU, many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them. FDVU notes that this is particularly a concern amongst Aboriginal women, many of whom are 'suspicious of child protection interventions',²¹ most likely because of past government policies supporting the removal of Aboriginal children from their families. Keel notes several other reasons for the non-reporting of family violence (and, in particular, sexual violence) by Aboriginal women and the failure to seek assistance from authorities, including

intimidation by authority figures and white people in general; closeness of communities leading to fear of reprisals or shame; the relationship of the [victim] to the perpetrator; unfamiliarity with legal processes; and a fear that the perpetrator will be sent to prison.²²

Although the under-reporting of sexual violence and domestic violence is also a problem in the broader community,²³ these factors indicate the need for more culturally appropriate processes for responding to, intervening in and preventing family violence in Aboriginal communities.

In a recent report setting out the state's 2004–2008 strategic plan for addressing family and domestic violence in Western Australia, FDVU neatly summarise Blagg's findings from consultative work with Aboriginal people throughout the state on the subject of family violence intervention. It was found that in responding appropriately to the problem of family violence there were 'a number of elements from an Indigenous perspective that need to be understood and respected',²⁴ including:

- rejection of 'criminalisation' as the main strategy to deal with family violence;

19. Government of Western Australia, *Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* (2002) 2. See Gordon Inquiry, recommendation 131.

20. See above p 44.

21. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 5.

22. Keel M, *Family Violence and Sexual Assault in Indigenous Communities: Walking the talk*, Briefing Paper No 4, Australian Institute of Family Studies (2004) 7.

23. Ibid.

24. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 37, referencing Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000).

Many women experiencing family violence avoid seeking assistance from authorities for fear that their children might be removed from them.

- less reliance on an explicitly feminist analysis and explanation of violence within intimate relationships;
- greater stress on the impact of colonialism, trauma, family dysfunction and alcoholism as primary causes;
- a view which sees male violence less as an expression of patriarchal power than as a compensation for lack of [traditional] status, esteem and value;
- greater stress on the impact of family violence on the family as a whole, rather than just women and children; and
- emphasis on a range of potential perpetrators, including husbands, sons, grandsons and other male kin.²⁵

Blagg also found that, as well as intervention strategies to protect family members from violence, Aboriginal people were keen to focus on issues of prevention of family violence by education (particularly of young males) and healing of the family and community as a whole, rather than of perpetrators and victims independently.²⁶ Blagg stressed the need for intervention strategies that work through, or take advantage of, existing community structures such as street patrols, warden schemes and shelters – coordinated regionally rather than centrally and locally adapted to suit the cultural dynamics of the relevant community.²⁷ Blagg recommended a comprehensive whole-of-government approach emphasising intervention strategies that maintain the family unit and introduce ‘pathways to healing’.²⁸ One successful family violence intervention program is outlined in Blagg’s background paper to this reference and is worth setting out in full here.

One of the longest running initiatives in Western Australia is the Derby Family Violence Prevention Project, established in the late 1990s. The project operates in Derby and the Mowanjum Aboriginal Community and has evolved to take into account cultural factors by, for example, having separate young men’s and young women’s spaces and programs and working with close support from local Elders. The project is supported by the local shire and an inter-agency support group, and has had a strong focus on

alcohol issues (the project was initially situated in the sobering-up shelter), as well as on the philosophy of early intervention. The latter is particularly important in the Aboriginal context. Firstly, Aboriginal youths tend to form intensive relationships, often involving violence, earlier than many non-Aboriginal youths (so we may not just be preventing violence in later relationships but also intervening in current ones). Secondly, there are some embedded myths about Aboriginal men’s lawful entitlement to violence (based on a distorted version of Aboriginal law) that need to be challenged early. Thirdly, there are some very damaging cultural practices (that affect adults as well as young people) such as the destructive practice of ‘jealousing’. The LRCWA’s consultations in Derby and Mowanjum revealed a strong sense of ownership of the program locally.²⁹

In relation to the success of family violence intervention projects, Blagg stresses the distinction between a *community-based* service (where a non-Aboriginal designed service is simply relocated to a community setting with or without local Aboriginal involvement in service delivery) and a *community-owned* service (where a service is designed and delivered by the local Aboriginal community).³⁰ The Derby Family Violence Prevention Project model, which is highly responsive to the particular needs and cultural sensibilities of its constituent community, would appear to suggest a good starting point for other community-based and community-owned intervention programs in Western Australia.

Proposal 70

That the Western Australian government actively encourage and resource the development of community-based and community-owned Aboriginal family violence intervention programs that are designed to respond to the particular conditions and cultural dynamics of the host community.

25. Ibid.

26. Blagg H, *Crisis Intervention in Family Violence: Strategies and Models for Western Australia* (Perth: Domestic Violence Prevention Unit, 2000) 15.

27. Ibid 2. The need to incorporate a stronger community dimension in coordinated responses to family violence in Indigenous communities was a consistent theme in the Commission’s consultations with Aboriginal people for this reference.

28. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 3.

29. Blagg H, *A New Way of Doing Justice Business? Community Governance Mechanisms and Sustainable Governance in Western Australia*, LRCWA, Project No 94, Background Paper No 8 (January 2005) 13 (footnotes omitted).

30. Ibid 1.

A New Approach to Addressing Aboriginal Family Violence and Child Abuse

Western Australia's strategic plans

The Western Australian Family and Domestic Violence State Strategic Plan 2004–2008 in conjunction with *Putting People First: The Western Australian State Government's Action Plan for Addressing Family Violence and Child Abuse in Aboriginal Communities* invoke the whole-of-government response to the issue of family violence that was recommended by the Gordon Inquiry. The strategic plan, which caters for all cultural backgrounds, emphasises a 'balanced approach' encompassing prevention of family violence (by facilitating community education and public awareness); protection of victims (by developing screening procedures for families that interact with certain government services such as hospitals and family and community services); and provision of services for victims and perpetrators (by developing programs that meet the healing needs of families and communities and rehabilitative needs of perpetrators and increase the number of support options for women and children experiencing family violence).³¹ The strategic plan does profess to address problems of Aboriginal family violence; however, the plan's framework still appears to follow the feminist domestic violence model criticised by Blagg in his 2000 report.

Somewhat in contrast to this, the government's action plan in response to the Gordon Inquiry—*Putting People First*—is directed specifically to family violence and child abuse problems in Western Australian Aboriginal communities. This plan details the government's commitment of resources to the expansion of perpetrator and victim counselling programs; family strengthening and healing programs; expanded child protection and sexual assault services; increased Aboriginal support workers in the regions; and

development of community-based, culturally targeted initiatives.

The Commission applauds the state government's willingness to respond to the issue of family violence and child abuse in Aboriginal communities; however, it is important that, in implementing these plans, the government ensures a balanced approach to dealing with the issues. The progress reports on government implementation of *Putting People First* available at the time of writing³² demonstrate that, at least for the moment, the protection of children as victims of family violence and the detection of (and response to) child sexual abuse is taking precedence over the protection of women in abusive relationships and the institution or resourcing of community-based (and, ideally, community-owned) programs explicitly targeting the prevention of family violence.³³ This is perhaps not surprising given the Gordon Inquiry's overwhelming focus on child sexual abuse issues and the special vulnerability of children; but nonetheless, the alarming statistical evidence of increasing violence against women and the flow-on effects that this has on children (in terms of child abuse, normalisation of violence, encouragement of intergenerational family violence and juvenile offending)³⁴ in Aboriginal communities warrant an immediate, strong and coordinated response in respect of all aspects of family violence outlined above.

The Commission is also aware that there is often, in the case of Indigenous affairs, a significant 'gap between the promises of paper policies and what is happening on the ground'.³⁵ This is both a product of substantive inequality between the Aboriginal and non-Aboriginal communities and previous government focus on policy process rather than policy outcomes. In their background paper for this reference, Neil Morgan and Joanne Motteram stress that 'monitoring, benchmarking and evaluation are integral to ensuring that decisions about public expenditure are evidence-led and, most importantly, to transforming the world

31. FDVU, *Western Australian Family and Domestic Violence State Strategic Plan* (2004) 27–32.

32. At the time of writing the Gordon Inquiry response plan *Putting People First*, had been in operation for just over two years.

33. For example, none of the advances on systemic change listed in the first and second implementation progress updates address the issue of family violence as a contributor to or cause of child abuse issues in Aboriginal communities: Government of Western Australia, *First Progress Update on the Implementation of 'Putting People First'* (June 2003) 10–12; *Second Progress Update on the Implementation of 'Putting People First'* (December 2003) 9–11. Further, those elements of the action plan aimed specifically at reducing family violence or protecting adult victims of family violence (such as enhanced temporary accommodation, the provision of community 'safe places' and the development of prevention programs for family violence) appear to be in the consultation or development phase, see: Government of Western Australia, *Gordon Implementation – Regional Update* (February 2004).

34. In relation to juvenile offending, recent studies undertaken by the Australian Institute of Criminology have established a causal relationship between child maltreatment and offending behaviour. See: Stewart A, Dennison S and Waterson E, *Pathways From Child Maltreatment to Juvenile Offending*, Australian Institute of Criminology, Report No 241 (2002).

35. Morgan N & Motteram J, *Aboriginal People and Justice Services: Plans, programs and delivery*, LRCWA, Project No 94, Background Paper No 7 (December 2004) 133.

There is often, in the case of Indigenous affairs, a significant 'gap between the promises of paper policies and what is happening on the ground'.

of paper bullet points in policy documents into concrete achievement' for Indigenous Australians.³⁶

The six-monthly reporting requirement attached to *Putting People First* is an important step towards ensuring that the separate government departments carrying responsibility for initiatives are accountable for the money they receive to implement the plan. However, evaluation of these initiatives must be ongoing and, moreover, must be localised with an emphasis on positive practical outcomes. It is imperative that the government regularly consult with those responsible for frontline service delivery and with those receiving the benefits of such service to genuinely assess the effectiveness of programs and monitor the changing needs of communities. In addition, programs and government service delivery must be flexible and dynamic on a local level to accommodate cultural differences, to involve (as Blagg has recommended) established local Aboriginal-run services and to ensure that the best result is achieved for each community. As Libby Carney reports, 'with the abolition of ATSIC and the distribution of Indigenous services into mainstream government departments there is a [legitimate] concern as to whether family violence services will continue to provide the best culturally appropriate services possible to Indigenous women'.³⁷ The Commission shares this concern.

Proposal 71

That progress reporting and evaluation of programs and initiatives dealing with family violence and child abuse in Aboriginal communities be ongoing with an emphasis on positive, practical outcomes and demonstrate genuine consultation with those responsible for frontline service delivery and adaptation of programs to suit the changing needs and cultural differences of client communities.

Restraining orders

During consultations for this reference the appropriateness of the restraining order regime in Western Australia was criticised in relation to its application to Aboriginal people. For example, it was said that:

- Restraining orders do not work for Aboriginal women because they recognise strong cultural and social obligations to maintain family relationships. Many Aboriginal women do not therefore support the permanent removal of their men from the family home.
- Aboriginal women do not always understand that a restraining order, once obtained, must be cancelled before contact with their partner and the effect of orders is not always adequately explained to all parties.
- Restraining orders should not preclude cohabitation of the perpetrator of family violence and the protected person but should impose conditions upon the perpetrator's continual cohabitation with the protected person.
- Many Aboriginal women simply want the ability to temporarily escape a violent situation by removal to a 'safe place' for a period of time or, alternatively, to have the perpetrator of family violence temporarily removed to a place to 'cool off' or 'sober up' before returning to the family home.
- Restraining orders can be effective but more emphasis needs to be placed on family healing and behavioural reform.³⁸

Such criticisms have also been recorded by researchers in other studies on family violence in Western Australia.³⁹

Since the Commission's consultations with Aboriginal communities, significant emphasis has been placed on

36. Ibid 138. See also Marks G, *The Value of Benchmarking to the Reduction of Indigenous Disadvantage in the Law and Justice Area*, LRCWA, Project No 94, Background Paper No 3 (June 2004).

37. Carney L, 'Indigenous Family Violence: Australia's Business' (2004) 6(1) *Indigenous Law Bulletin* 15, 16.

38. For example, see also LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 19; *Geraldton*, 26–27 May 2003, 17–18; *Carnarvon*, 30–31 July 2003, 6; *Broome* 17–19 August 2003, 29; *Albany*, 18 November 2003, 21; *Fitzroy Crossing*, 3 March 2004, 47.

39. See Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 11–12; Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 19.

the development by government of alternative strategies to address family violence in Aboriginal communities in Western Australia. The issues raised above in respect of the operational inappropriateness of restraining orders in Aboriginal communities has been acknowledged and in some part addressed by the 2004 amendments⁴⁰ to the *Restraining Orders Act 1997* (WA) (the Act). For example, the amendments oblige courts to take positive steps to ensure that all aspects of a restraining order (including the processes to have an order varied, cancelled or extended) are satisfactorily explained to the parties affected by the order. The amendments also introduce the concept of a short-term order issued by police in cases where family and domestic violence is detected.

Under the new Division 3A of the Act, police may issue a 24- or 72-hour police order imposing

such restraints on the lawful activities and behaviour of a person as the officer considers appropriate to prevent a person —

- (a) committing an act of family and domestic violence; or
- (b) behaving in a manner that could reasonably be expected to cause a person to fear that such an act could be committed.

A 24-hour order may be made at the discretion of police without the consent of the person intended to be protected by the order. In the case of the 72-hour order consent is required; although, where a child is at risk of family violence, a welfare officer or guardian may consent to the making of an order.⁴¹ An order cannot be extended by a police officer and another order cannot be made in relation to the same facts.

It has been noted by some commentators that police attitudes to Aboriginal victims of family violence have not always been positive and that the concerns of victims are often trivialised, particularly in cases of repeat callouts.⁴² In particular, it has been said that police appear to think that where a woman is unwilling to

make a firm commitment to ending an abusive relationship and is likely to return to her partner after a 'cooling off' period, it is not worth the trouble of pursuing an interim telephone restraining order.⁴³ There is also some perceived reluctance by police to charging the perpetrators of assault in domestic situations.⁴⁴ The Ombudsman recently reported that a number of police officers and support workers interviewed for the 2003 *Investigation into the Police Response to Assault in the Family Home* 'were under the misapprehension that it is the responsibility of the victim to lay charges against the perpetrator' of family violence.⁴⁵ The Ombudsman made a series of recommendations to clarify police policy and improve police education in matters of family and domestic violence.

Currently the Western Australian Police Service professes a 'zero tolerance' policy in respect to family violence in Aboriginal communities and has initiated consultative processes to improve response strategies.⁴⁶ It is hoped that the powers extended to police by the 2004 amendments will assist authorities to take a more positive role in combating family violence by initiating immediate action to separate perpetrators of family violence from their victims in situations where there is evidence of family violence or a reasonably perceived threat of such violence. The police order system is more efficient and immediate than the telephone order system, which requires police officers to leave the scene of the violence to begin proceedings to obtain the order. The system also puts police, rather than the victim, into the role of complainant and favours the victims of family violence by allowing for the temporary removal of the perpetrator of violence from the family home. This should result in less upheaval for women and children (the usual victims of family violence) who might otherwise be forced to seek refuge elsewhere.

Another advance under the amendments to the Act is the empowerment of police to enter and search premises if family and domestic violence is reasonably

40. *Acts Amendment (Family and Domestic Violence) Act 2004* (WA), proclaimed 23 November 2004 and effective from 1 December 2004.

41. A 72-hour police order is often used to protect a victim of family violence over a weekend so that a full Violence Restraining Order can be applied for through the courts on a Monday.

42. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 24; Ombudsman WA, *An Investigation into the Police Response to Assault in the Family Home* (September 2003) 13–26.

43. Blagg, *ibid*; Department of Justice (DoJ), *Review of Legislation Relating to Domestic Violence*, Final Report (June 2004) 38. An interim telephone restraining order may last for up to 72 hours. According to the DoJ report, the process of securing an interim telephone restraining order is particularly time consuming for police and is in any event unable to immediately address the problem as police are required to leave the scene and return to the station to organise an order through the police communications and the duty magistrate in Perth. Orders often take several hours to be judicially approved and issued and then the perpetrator must be located again to have the orders served.

44. Ombudsman WA, *An Investigation into the Police Response to Assault in the Family Home* (September 2003) 21.

45. *Ibid*.

46. WA Police Service, 'Current Western Australia Police Service Direction in Policy and Programs that Relate to Indigenous Family Violence' (undated), available at <www.police.wa.gov.au>.

suspected and to arrange for such assistance as is reasonable in the circumstances.⁴⁷ This encourages police officers to assume a proactive role, rather than the traditional reactive role, in respect of family violence. Of course, with any extension to police powers there is always the fear that such power might be abused; for this reason the amendments to the Act are subject to statutory review after two years of operation to gauge the effectiveness of the amendments.

Invitation to Submit 14

The Commission invites submissions on the effectiveness of the new police order regime in Aboriginal communities in the control of family violence and in securing the immediate protection of Aboriginal women and children.

Refuges and shelters

Regardless of how effective the new police order regime may be in providing relief to women and children the subject of family violence, there will still be an important role for women's refuges and supported accommodation assistance for those who are in need of longer term accommodation. In some cases, where a restraining order or police order is in place there may still be a risk of violence (or even retaliation) from other males in the household and in these circumstances appropriate accommodation must be available to women and children. Currently there are 35 women's refuges in Western Australia throughout Perth and the main regional centres. The provision of 'safe houses' for women and children in more remote communities remains a pressing issue and one that is a focus of the Department of Community Development under the *Putting People First* plan.

It is hoped that some review of the cultural appropriateness of current temporary accommodation facilities is also conducted under this plan. Consultations with Aboriginal women conducted by Blagg in 1999 suggested that 'refuge policies tend to conform [to] culturally dominant conceptions of the nuclear family'⁴⁸ and do not cater for extended Aboriginal families. Clearly there is a need to ensure that women's refuges likely

to cater for Aboriginal women escaping family violence are adequately resourced to enable dependants of victims to also be accommodated.

As important as the provision of women's refuges is, there is also a need for development of shelters that cater for men so that women and children are not always forced to leave the family home to escape violence. In particular, Aboriginal men who are subject to 24- or 72-hour police orders will require temporary accommodation in a men's shelter or sobering-up facility. Ideally, such accommodation facilities should have counselling services available and provide encouragement to men to participate in family violence prevention programs. It appears that work is currently being undertaken in most regions under the auspices of *Putting People First* to develop and properly resource perpetrator programs, community-run night patrols and men's shelters. The success of *Putting People First* will depend upon the enhancement of current community-based initiatives and the development of new facilities for men to assist them to address problems with violence and keep them out of the criminal justice system.

Family Violence, Child Abuse and Customary Law

Customary Law is No Excuse for Family Violence

In a 2000 report for the Western Australian Domestic Violence Prevention Unit, Blagg notes that Aboriginal men sometimes excuse violent domestic behaviour by reference to their role of authority under Aboriginal customary law or in their traditional culture.⁴⁹ However, as the consultations for this reference and other studies have revealed, Indigenous women in general do not support this claim and do not consider interpersonal violence or child abuse to be justified under customary law.⁵⁰ Former Social Justice Commissioner Bill Jonas has commented that:

Indigenous family violence is not normal. And contrary to popular myth, or romanticised notions of Aboriginal culture, or the less predominant but still existing racist stereotypes of 'savagery', it is not culturally

47. With the approval of a senior officer.

48. Blagg H, *Crisis Intervention in Family Violence: Summary Report* (Perth: Domestic Violence Prevention Unit, 2000) 24.

49. Ibid 4.

50. Ibid and studies cited therein. See also Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 68–71, 'Cultural Issues – Facts and Fallacies'. Indeed, Aboriginal women respondents at consultations for this reference argued that men should face Aboriginal justice for violent behaviour in the family context.

acceptable. And it is not part of our systems of customary law. In fact it is the reverse. It is an indication of the fragility of such customary law and a sign of breakdown in traditional governance mechanisms in communities. It is, in short, an indication of community dysfunction.⁵¹

This view that there is no legitimate basis to claims that family violence is culturally sanctioned under Aboriginal customary law was also stressed by Catherine Wohlan in her background paper for this reference.⁵² Women consulted for the background paper shared their concerns for the next generation of young men and women that may be persuaded by these claims that acts of violence against women are culturally sanctioned within their communities. They also raised concerns about use of customary law in the court context as justification or excuse for offences committed against women and children. Wohlan alluded to cases of sexual assault of children and violence against women where evidence was introduced in court suggesting that such behaviour was culturally sanctioned under Aboriginal customary law. She submitted that 'in the court setting, only segments of Aboriginal law are being put forward' often out of cultural context, with the result being that any understanding of customary law in its legitimate form is limited.⁵³ For these reasons, Wohlan argued that family violence and customary law must be seen as separate matters and that these distortions of customary law and the status of women in Aboriginal society should not be recognised to the detriment of Aboriginal women.⁵⁴

A literature review conducted by the Centre for Anthropological Research at the University of Western Australia for the Gordon Inquiry found that 'cultural context' was an important element in considering whether family violence in Indigenous societies is traditionally sanctioned. The review found that:

[T]he anthropological literature reveals examples of what, on the face of it, might be taken as instances of family violence or abuse. But the literature also shows that such actions are invariably within the sphere of traditional practice, ritual or the operation of customary law. We have found little material that suggests that violence or abuse per se are condoned, or took place with impunity, outside traditionally regulated contexts.⁵⁵

In her book *A Fatal Conjunction: Two Laws, Two Cultures*, Joan Kimm recites a number of examples that indicate that women in traditional Indigenous societies were 'vulnerable to "traditionally regulated" violence' for 'alleged misbehaviour' or 'infringing male law'.⁵⁶ However, Wohlan has pointed out that, from an anthropological perspective, few examples of the violence described against Aboriginal women in Kimm's book could be said to have been supported by customary law and that more detail would be required for such a claim to be made out.⁵⁷ This lack of cultural evidence appears to have been the reason behind the dismissal of defence evidence of culturally sanctioned violence against women in *Ashley v Materna*. In that case Bailey J commented:

In the absence of evidence as to the obligatory nature of the alleged [customary] law and the consequences for non-compliance, elevation of a morally indefensible practice to the status of 'customary law' to which courts could or should have regard would be to invite ridicule of the courts and make a mockery of the fundamental principle that all people stand equal before the law.⁵⁸

In response to the concerns of Aboriginal women reported to this inquiry and in recognition of the provisions of the United Nations *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Convention on the Rights of the Child*,⁵⁹ it is the Commission's position that family and interpersonal violence against women and children cannot be

51. Jonas W, *Family Violence in Indigenous Communities: Breaking the silence?*, paper delivered at the launch of the University of New South Wales Law Journal Forum, Sydney (25 July 2002) as cited in Davis M & McGlade H, *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 13.
52. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 33–34.
53. Ibid 37.
54. Ibid 1. See also the comments of Megan Davis and Hannah McGlade in regard to distortions of customary law in family and interpersonal violence cases, particularly where women are victims: *International Human Rights Law and the Recognition of Aboriginal Customary Law*, LRCWA, Project No 94, Background Paper No 10 (March 2005) 13–14.
55. As cited in Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 69.
56. Kimm J, *A Fatal Conjunction: Two Laws, Two Cultures* (Sydney: The Federation Press, 2004) 46.
57. Wohlan C, *Aboriginal Women's Interests in Customary Law Recognition*, LRCWA, Project No 94, Background Paper No 13 (April 2005) 20.
58. *Ashley v Materna* [1997] NTSC 101 (21 August 1997), per Bailey J. There is increasing evidence that courts are beginning to recognise that so-called culturally sanctioned violence against women is unacceptable; see, for example, *R v Woodley, Boonga and Charles* (1994) 76 A Crim R 302 where the Western Australian Court of Criminal Appeal stressed the need to protect Aboriginal women from violence and the need to treat the perpetrators of Aboriginal family violence in the same way as in other sectors of the community.
59. See the discussion in Part IV, above p 74–75, on the subject of the conflict between Indigenous cultural rights and women's individual rights at international law. Australia's international obligations and the potential of conflict with recognition of certain customary law or cultural practices is also discussed earlier in this Part in relation to the recognition of promised marriage contracts: see above pp 333–34.

Family and interpersonal violence against women and children cannot be condoned or excused by reference to traditional cultural relationships . . .

condoned or excused by reference to traditional cultural relationships under Aboriginal customary law. The Commission accepts that there will be circumstances where such arguments may legitimately be raised in mitigation of sentence;⁶⁰ however, without substantive anthropological evidence and/or Aboriginal women Elders' evidence in support of the defence proposition, courts should view such arguments advanced in mitigation of crimes of violence against Aboriginal women with suspicion. The Commission's proposal for community justice groups (detailed above in Part V)⁶¹ will, when implemented and operational, provide courts with a source of information about relevant customary laws with less potential for male-dominated gender bias.

Customary Law Promised Marriages and Child Sexual Abuse

The 2002 *Pascoe* case⁶² in the Northern Territory is responsible for bringing attention to the continuing practice of promised marriages in some Indigenous communities and the potential of the defence (or mitigating circumstances) of Aboriginal customary law to the charge of carnal knowledge of a child.⁶³ In *Pascoe*, a 50-year-old man was convicted of carnal knowledge of a 15-year-old girl who was his promised wife (although they had not yet started living together as husband and wife). He was sentenced by the magistrate to 13 months' imprisonment. On appeal to a single judge of the Supreme Court the sentence

was reduced to 24 hours on the basis that Pascoe was ostensibly exercising his conjugal rights. On appeal to the Court of Criminal Appeal, Martin CJ acknowledged that Pascoe was 'participating in a culturally encouraged practice' and that the offence was not 'simply related to sexual gratification'.⁶⁴ For this reason he agreed that there were mitigating circumstances to the commission of the offence; however, he stressed that:

Notwithstanding the cultural circumstances surrounding this particular event, the protection given by law to girls under the age of 16 from sexual intercourse is a value of the wider community which prevails over that of this section of the Aboriginal community.⁶⁵

The Court of Criminal Appeal therefore increased Pascoe's sentence to 12 months' imprisonment, suspended after one month.⁶⁶ A further appeal to the High Court was refused special leave.

Until very recently the *Criminal Code* of the Northern Territory provided a defence against carnal knowledge offences for Aboriginal 'persons living in a husband and wife relationship according to tribal custom'.⁶⁷ There was no age limit specified in the relevant section. In its 1986 report on recognition of Aboriginal customary laws, a majority of the ALRC agreed with the position taken in the *Criminal Code* (NT); however, the ALRC provided the qualification that such a defence should only be available where the defendant can prove on the balance of probabilities that he honestly believed that his traditional wife consented to sexual intercourse.⁶⁸

60. A discussion of the circumstances where Aboriginal customary law may legitimately be taken into account in relation to mitigation of sentence is found under Part V, 'Aboriginal Customary law as a Reason or Explanation for the Offence', above pp 215–20.

61. See Part V, 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

62. *Pascoe v Hales* [2002] SCC 20112873 (Unreported, Supreme Court Northern Territory, Gallop AJ, 8 October 2002); *Hales v Jamilmira* [2003] NTCA 9 (Unreported, Court of Criminal Appeal, Supreme Court Northern Territory, Martin CJ, Mildren & Riley JJ, 15 April 2003).

63. The *Pascoe* case is discussed in greater detail in the background papers produced for this reference. See: Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 53 & 55; McIntyre G, *Aboriginal Customary Law: Can it be Recognised?*, LRCWA, Project No 94, Background Paper No 9 (February 2005).

64. *Hales v Jamilmira* [2003] NTCA 9 (Unreported, Court of Criminal Appeal, Supreme Court Northern Territory, Martin CJ, Mildren & Riley JJ, 15 April 2003) [25].

65. *Ibid* [26].

66. In a similar (and more recent) case, a traditional Aboriginal man pleaded guilty to one offence of aggravated assault and one offence of having sexual intercourse with a child (who was the defendant's 14-year-old promised wife). The defendant was sentenced to two years' imprisonment to be suspended for a period of two years after serving one month in jail. The sentencing judge acknowledged the seriousness of the offences but also took into account that the defendant considered that the conduct was justified under Aboriginal customary law and the defendant's lack of knowledge that he had committed an offence against the law of the Northern Territory. See *R v CJ* (Unreported, Supreme Court of Northern Territory, SCC 20418849, 11 August 2005 (Martin CJ) available at <http://www.nt.gov.au/ntsc/doc/sentencing_remarks/2005/08/gj_20050811.html> 7. An appeal against the leniency of the sentence in this case is pending. For further discussion of this case, see 'Sentencing' in Part V, above pp 217–18.

67. *Criminal Code* (NT) s 126 (relevant sub-section now repealed).

68. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) 218, [320].

The Gordon Inquiry heard anecdotal evidence of promised marriages in Western Australia 'providing [cultural] sanction to men to be able to have sexual relations with young girls'⁶⁹ of the kind professed in the *Pascoe* case. The Inquiry appears to have discounted this evidence on the basis that, although traditional Aboriginal societies did practise the betrothal of young girls to older men, the promised marriages did not usually take effect until the girls reached puberty and that sexual relations within promised marriages were not condoned until the girl was post-menarche. However, as Kimm has noted, post-menarche girls may be as young as 10 years old and if promised marriage 'entails carnal knowledge of girls below the age of consent',⁷⁰ evidence, however anecdotal, of such practice must be taken seriously.

Under s 319(2) of the Western Australian *Criminal Code* a person under the age of 13 years cannot consent to sexual intercourse. For a child between 13 and 16 years it is a defence to certain sexual offences, including sexual intercourse, if the accused person can prove lawful marriage to the child.⁷¹ 'Lawful marriage' is not defined in the *Criminal Code* but under the *Marriage Act 1961* (Cth) a person reaches marriageable age at 18 years or, in exceptional circumstances, at 16 years.⁷² There is no provision for legalising marriages where one or both of the parties are under the age of 16 years. There is also no provision recognising customary law or traditional marriages.

In view of the very substantial evidence of child sexual abuse in Western Australian Aboriginal communities, the Commission believes that it would be imprudent to make special provision for a defence in relation to sexual offences against children the subject of a

promised or traditional marriage. In arriving at this conclusion the Commission has considered Australia's international obligations under CROC and is informed by the best interests principle in Article 3(1) of that convention.

The Commission also notes that almost two decades have passed since the publication of the ALRC's report and unlike the Northern Territory, where the practice of promised marriages still remains in some communities,⁷³ there are few reported instances of this customary practice continuing in Western Australia.⁷⁴ Moreover, following the *Pascoe* case in March 2004, the Northern Territory government removed the marriage defence for customary law marriages and any other marriage-type relationship involving girls under the age of 16 years.⁷⁵

It is important to note here that, although the defence of tribal marriage in relation to offences of carnal knowledge existed in the Northern Territory at the time of the *Pascoe* case, the defence was not in fact argued. *Pascoe* had pleaded guilty to the offence and asserted the fact of his promised marriage under customary law in mitigation of sentence. The recognition of Aboriginal customary law by courts in mitigation (or, in certain circumstances, in aggravation) of sentence is supported by the Commission and is the subject of a proposal regarding the development of legislative provisions to regulate the way in which courts are informed about customary law issues in the sentencing process. The nature and scope of proposed legislation in this area is dealt with comprehensively above in Part V 'Aboriginal Customary Law and the Criminal Justice System'.⁷⁶

69. Gordon S, Hallahan K & Henry D, *Putting the Picture Together: Inquiry into Responses by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (July 2002) 69.

70. Kimm J, *A Fatal Conjunction: Two Laws, Two Cultures* (Sydney: The Federation Press, 2004) 64.

71. *Criminal Code* (WA) s 321(10).

72. *Marriage Act 1961* (Cth) ss 11 & 12.

73. In their recent inquiry into Aboriginal customary law the NTLRC reported that promised marriages are no longer practiced by many Northern Territory communities and in some were never practiced. NTLRC, *Aboriginal Communities and Aboriginal Law in the Northern Territory*, Background Paper No 1 (2003) 26.

74. In his background paper for this reference Greg McIntyre suggests that whilst there are instances of promised marriage in the adult Aboriginal population of Western Australia it is no longer practised in the vast majority of Aboriginal communities in this state. As well, he notes that, in his experience, those adults that were the subject of promised marriages had some choice as to whether to enter the marriage. See McIntyre G, *Aboriginal Customary Law: Can it be recognised?*, LRCWA, Project No 94, Background Paper No 9 (February 2005) 3. As mentioned above, the Commission encountered some reference to continuing practice of promised marriages in remote communities; however, there appears to be some degree of choice accorded to promised marriage partners as to whether they will enter the marriage: see above 'Recognition of promised marriage contracts', pp 333–34.

75. The marriage defence was comprehensively removed from the Code by the *Law Reform (Gender, Sexuality and De Facto Relationships) Act 2003* (NT), which came into effect on 17 March 2004. The removal of the defence was applauded by members of the Indigenous community, although some critics opposed it on the grounds that it might set a precedent for undermining customary law. See: Anderson A, 'Women's Rights and Culture: An Indigenous woman's perspective of the removal of traditional marriage as a defence under Northern Territory law' (2004) 6 (1) *Indigenous Law Bulletin* 30–31.

76. In particular see pp 212–20.

It is important that any customary law responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law.

The Need for the Protection of Australian Law

Despite criticism of the effectiveness and cultural appropriateness of available measures for protection against family violence, it is widely recognised by Australian governments and Aboriginal communities that Aboriginal women and children need to be able to rely upon the protection of Australian law. In a submission to the NTLRC's 2003 inquiry into Aboriginal customary law in the Northern Territory, the HREOC Sex Discrimination Commissioner argued that Aboriginal women must not be precluded from accessing 'mainstream law in cases involving violence'.⁷⁷ The Commissioner urged an approach that would limit the cases to which customary law can apply in relation to violence against women in recognition of the relative powerlessness of their position, particularly in relation to crimes such as sexual assault and family violence.

The Commission broadly agrees with this approach; however, it is acknowledged that there may be some role for culturally sanctioned, non-violent Aboriginal customary law strategies for dealing with perpetrators of family violence and that such customary law responses could, in certain circumstances, work in tandem with prevention and protection strategies provided for under Australian law.⁷⁸ Such customary law responses might include community 'shaming' of perpetrators of family violence or, in respect of repeat or serious offenders, banishment from the community.

It is important that any customary law responses to family violence do not deprive Aboriginal women of their ability to seek protection or initiate criminal proceedings under Australian law. However, many Aboriginal women consulted by the Commission sought alternative responses to family violence that would not

see their men imprisoned (the rehabilitative value of which is, at best, tenuous). An Aboriginal customary law response at first instance, and in less serious cases of family violence, might assist in diverting Aboriginal men from the criminal justice system whilst allowing for increased opportunities for family and community healing. In some cases, as argued by respondents to the Commission's community consultations, it may also be more effective in addressing violent behaviour and rehabilitating offenders than measures under the criminal law.

The community justice groups, proposed by the Commission in Part V above,⁷⁹ may be an appropriate vehicle for non-violent customary law strategies to address family violence. The requirement that these groups have equal representation of men and women and of family or skin groups will assist in establishing the cultural authority necessary for the success of customary law sanctions, particularly in regard to violence perpetrated against women. Importantly, the existence of these groups will not preclude a victim from seeking redress under Australian law. The Commission invites submissions on other means of introducing non-violent customary law strategies to address family violence as well as comments on the appropriateness of such strategies and the potential for them to complement existing protection and prevention strategies under Australian law.

Invitation to Submit 15

The Commission invites submissions on the possibility of introducing non-violent customary law strategies to address family violence in Aboriginal communities and the potential for such strategies to operate in tandem with protection and prevention strategies under Australian law.

77. Human Rights and Equal Opportunity Commission, Sex Discrimination Commissioner, *Submission to the Northern Territory Law Reform Committee Inquiry into Aboriginal Customary Law in the Northern Territory* (May 2003) 29.

78. A strategy also suggested by John Toohey in his background paper to this reference, see: Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) 12–13.

79. See above pp 133–41.



No Room for Complacency

In 2004 the Council of Australian Governments (COAG) committed to establishing a national framework for the prevention of family violence and child abuse in Indigenous communities.⁸⁰ The framework calls for jurisdictions to work cooperatively to improve how they engage with each other and with Indigenous communities in respect of this important issue. COAG established six principles to guide government action in this area: safety; partnerships; support; strong, resilient families; local solutions; and addressing the causes of family violence and child abuse.

Although the government has for some time indicated in various reports a willingness to address the epidemic of family violence in Western Australian Aboriginal communities, the alarming findings of the 2002 Gordon Inquiry have provided government with the impetus for immediate action. Western Australia therefore appears to be instituting the means for substantive change in each of the areas identified by COAG. It must, however, be recognised that these issues require a long-term commitment by the government and that there is no room for complacency. With continued regular reporting of progress on the implementation of the government's response to the recommendations of the Gordon Inquiry and with the institution of the proposals for reform enumerated in this Part the Commission is confident that substantial gains can be made by Aboriginal communities to address the causes of family violence and child abuse.

80. Council of Australian Governments, Communiqué, 25 June 2004, Attachment C.

PART VIII

Customary Hunting, Fishing and Gathering Rights

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Customary Hunting, Fishing and Gathering Rights

The ability to engage in customary harvesting of natural food resources is important to Aboriginal people in myriad respects. ATSIC has stressed that:

Hunting, fishing and gathering are fundamental to our peoples' contemporary and traditional cultures, help to define our identity, and are at the root of our relationship to the land. Hunting, fishing and gathering continue to provide a significant part of the diet of many of our people, and also provide a range of raw materials. As cultural activities hunting, gathering and fishing are important vehicles for education, and help demonstrate to our succeeding generations our understandings of our place in the world.¹

Over the past two decades a number of reports have been published on the subject of Aboriginal harvesting of natural food resources, many providing comprehensive recommendations to governments for the recognition of customary law rights of Aboriginal people. In particular, the past three years have seen some considerable focus in Western Australia on issues relating to Aboriginal hunting and fishing rights, conservation and land access. However, as EM Franklyn QC has observed in relation to fishing rights, 'there seems to have been few significant outcomes for Aboriginal people'.²

It has earlier been mentioned that despite numerous government consultative processes, reports and papers, the expectations of Aboriginal people (which are legitimately raised by this attention) are consistently dashed by ultimate inaction. The Commission recognises that the customary harvesting of natural food resources is an area where this is particularly prominent, yet there appears to be little justification for continued disregard

of the benefits of improved legislative recognition of customary law harvesting rights.

It should be noted that, in the following discussion of harvesting rights, the Commission does not attempt to provide a comprehensive review of the law in this area: other significant reviews have done that.³ Nor do we intend to usurp the recommendations of recent reports into these areas which provide dedicated, expert analysis of relevant issues. Rather, by the following examination and accompanying proposals, the Commission seeks to draw attention, once again, to the need for law reform in this area and, for the sake of completeness of this reference, to stress the significance, for the Aboriginal peoples of this state, of the connection to land forged by customary harvesting.

Principles of Traditional Aboriginal Harvesting of Natural Food Resources

Customary Law Entitlements to Hunt, Fish and Gather

Under customary law, a person's entitlement to fish, hunt animals, gather vegetable foods or exploit natural resources (such as water, firewood or minerals) is consequent upon their degree of connection to 'country'. Peter Sutton contends that there are two types of rights to country: core and contingent.⁴ Core rights include the right to speak (authoritatively) for country, the right to acquire and transmit interests over the area, as well as certain ceremonial rights. Core rights are exercised only by traditional owners.

1. ATSIC, *Aboriginal and Torres Strait Islander Commission Environmental Policy* (1994) 5, as cited in Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 25.
2. Franklyn, *ibid* 7.
3. See, in particular: Franklyn, *ibid*; ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Department of Conservation and Land Management, *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*, Consultation Paper (July 2003); Aboriginal Access And Living Areas Working Group, *Aboriginal Access And Living Areas Pastoral Industry Working Group* (Perth: Department of Planning and Infrastructure, September 2003); National Indigenous Fishing Technical Working Group, *Recommended Pathways Matrix* (National Native Title Tribunal, March 2004); National Indigenous Fishing Technical Working Group, *The Principles Communiqué* (National Native Title Tribunal, 2005); and Davies J, Higginbottom K, Noack D, Ross H & Young E (hereafter cited as Davies et al), *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999).
4. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 23.



Contingent rights are interests that flow from the core rights and are exercised, or bestowed on others, by traditional owners. These rights include the right to access country; the right to hunt, fish and exploit natural resources; the right to erect infrastructure or reside on the land; and the right to accumulate (and in certain circumstances, transmit) cultural and spiritual knowledge of country. Sutton explains:

[A] right to fish and hunt ... may be held under a standing licence on the grounds that one is married to a 'traditional owner', or is a long-term resident on the land, or on some other contractual or historical grounds. It might also flow from being a primary land-holder under customary law, that is, from being a holder of core rights. In all cases, however, the right to fish, or hunt, or live on the country, is a contingent one, because use rights are not self-sustaining.⁵

It will be clear from the above that entitlements to harvest natural food resources may be held as of right (as a traditional owner) or as a 'licence' (granted by a traditional owner) of a perpetual or periodic kind. Neighbouring clans might also exchange 'licences' to travel through and access certain resources on each other's land and sea territories, allowing for variation in diet and a means of survival if a clan's country was adversely affected by drought or other natural phenomena.⁶

Restrictions on entitlements

Sutton notes that restrictions would sometimes be placed on entitlements to harvest natural resources whether by licence or within the traditional owner group. According to Sutton restrictions would usually attach to immobile or non-renewable resources (such as stone and minerals), as well as resources with specific medicinal properties (such as naturally occurring narcotic plants) and resources of a 'precious or thinly distributed kind' (such as certain ground tubers and trees used for making spears or ceremonial items).⁷ Restrictions might also be enforced in respect of the persons permitted to harvest certain foods. Athol Chase reports that:

[I]n parts of Cape York dugongs could be approached, killed and eaten only by older initiated men. For women, youths and children even to be in contact with water which had dugong grease floating on it meant that they would become very ill. People in these categories could not even touch equipment to be used in hunting dugongs for fear that illness and misfortune would result.⁸

In some areas certain rituals had to be performed before the taking of natural resources, or the method of catching game or fish may be strictly prescribed.⁹ Certain restrictions might be placed on the time of day one

5. Ibid.

6. McKnight D, *People, Countries and the Rainbow Serpent: Systems of classification among the Lardil of Mornington Island* (Oxford: Oxford University Press, 1999) as cited in *Lardil Peoples v State of Queensland* [2004] FCA 298, [85]. Such permissions were subject to good relations between the tribes and may also be subject to certain conditions: see Sutton, *ibid* 4 & 26.

7. Sutton, *ibid* 33 and accompanying footnotes.

8. Chase A, 'Dugongs and Australian Indigenous Systems' cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [884].

9. For example, Sutton reports that in Wik country there was a place where spearing of fish was permitted 'but only if the man held a baler shell on his head and stood on one leg at the same time'. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 32.

Although traditional Aboriginal groups did not practise confined agriculture, certain methods of resource conservation were used which have parallels with colonial practices.

could collect water or there may be prohibitions against taking certain species at certain times of year.¹⁰ Hunting in places of sacred significance (such as in the vicinity of caves where ceremonial objects were stored or near burial grounds) was often forbidden. Indeed, it was not uncommon in Aboriginal society for entire sections of country to be closed to hunting or foraging activity for a substantial period following a death.¹¹

Restrictions on consumption

Restrictions or taboos would also attach to the consumption of certain foods by certain members of a tribe. For example, in some areas it is taboo for a person to consume food that is representative of that person's totem.¹² In others, a person's age, status, gender or health may dictate the types of foods permitted to be consumed.¹³ Food taboos also followed some deaths of tribal members. In particular, widows would be prohibited from consuming certain foods for long periods of time following the death of their husbands.¹⁴ Consumption of certain species may also be regulated by the species' maturation stage (or breeding status), indicating a keen sense of the need to conserve certain food resources.¹⁵

Harvesting Resources and Conserving Country

Entitlements to hunt, fish or forage are not completely untrammelled. Those who possess the right to harvest

resources are also vested with obligations toward the land.¹⁶ As Sutton says:

To forage as of right is also to forage 'properly'. Such rights carry responsibilities with them. To forage 'properly' is to carry out only what one has the right to do, something which arises from one's standing in relationship to the country and its owners. Foraging 'properly' is also partly a matter of how it is done, where it is done, at what time it is done, who is doing it, and with whom.¹⁷

Responsible harvesting of natural food resources often implies a conservation ethic for Aboriginal people.¹⁸ Many of the restrictions on harvesting mentioned above would likely have evolved from an intimate knowledge of the land and a realisation of the need to refrain from taxing certain resources to ensure regeneration and sustainability. Although traditional Aboriginal groups did not practise confined agriculture, certain methods of resource conservation were used which have parallels with colonial agricultural practices. In its report on the recognition of Aboriginal customary laws, the ALRC cited examples of practices such as the germination and transplanting of trees, the regeneration of tuber stock, the distribution of seeds, the rotation of fishing sites and the use of controlled burning.¹⁹

Along with their obligation to conserve country in a practical sense, Aboriginal people were required to perform complex rituals to enhance the reproduction of certain species,²⁰ to replenish or purify water supplies and to pay 'respect to the propagative powers of ancestral beings'.²¹ These ceremonial activities were

10. Ibid. See also Northern Territory Government, *Indigenous Fishing Status Report 2003*, Fishery Report No 78 (October 2004) 1 which states that 'Aboriginal customary fishing and hunting is done according to seasons, which allows some species to be targeted when they are in abundance and in prime condition'.

11. Sutton, *ibid.*

12. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [884], referring to the Lardil peoples of Mornington Island.

13. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 32.

14. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 389; Tonkinson R, *The Mardudjara Aborigines: Living the dream in Australia's desert* (New York: Holt, Rinehart and Winston, 1978) 85.

15. Sutton P, *Kinds of Rights in Country: Recognising customary rights as incidents of native title*, Occasional Paper No 2 (Perth: National Native Title Tribunal, 2001) 32.

16. Ibid 31–32.

17. Ibid 32.

18. Ibid.

19. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [883].

20. See Altman JC, *Hunter-Gatherers and the State*, as cited in ALRC, *ibid* [882].

21. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development (1999) 15.

considered an integral part of the responsibility of the traditional owners to care for the land.²² The act of foraging itself was also ‘an overt part of caring for country’.²³ It embodied an intimate relationship with the land and facilitated the transmission of traditional ecological knowledge and land management practices to children.²⁴

The Role of Hunting, Fishing and Gathering in Contemporary Aboriginal Society

Although few Aboriginal people today would depend exclusively on hunting and gathering of natural food resources for subsistence, these activities continue to define Aboriginal peoples’ fundamental connection to the land.²⁵ Davies *et al* have noted that harvesting ‘expresses the vital linkage of [Aboriginal] people to their country, reinforces their spiritual beliefs governing their existence and responsibility for their land and provides a means for passing on social and cultural knowledge to their children’.²⁶ Harvesting can also be seen as a manifestation of self-determination²⁷ and importantly, in relation to the current reference, harvesting has a strong connection with the maintenance of Aboriginal customary law in contemporary society:

Hunting ties the past to the present, but it is not simply the survival of some prior subsistence gambit ... it is an aspect of the law ... Just like ritual, hunting affords men the opportunity of making claims regarding their position and right to authority in the group ... To hunt, then, is, as with ritual participation, to follow the law, demonstrate its great potency, and guarantee its continuance.²⁸

As was seen earlier in the context of discussion of Indigenous cultural and intellectual property,²⁹ harvesting of natural resources also has economic significance to Aboriginal peoples. This significance may be found in the provision of an economic base for a community by exploitation of traditional plant or mineral knowledge or in relation to day-to-day subsistence. Regrettably, there is little data to enable quantification of the economic significance of subsistence harvesting to Western Australian Aboriginal peoples,³⁰ or indeed of the extent to which harvesting of bush foods occurs today.³¹ However, studies undertaken in some discrete Aboriginal groups in Northern Australia, Cape York and the Torres Strait indicate that subsistence harvesting contributes significantly to the diets of some Indigenous people and that this has a correlative positive economic impact on incomes.³² Small-scale bartering or exchange of harvested foods can also add to the local economy, as well as introduce some variety to the diets of Aboriginal people.

But perhaps the most important consequence of subsistence harvesting is its direct health benefits for Aboriginal people. The consumption of fish, wildlife and other bush foods can enhance the nutritional values of diets that might otherwise consist of processed store-bought foods with high fat, sugar and sodium contents. The act of harvesting also encourages physical exercise that can be undertaken in a social way, enhancing social and cultural wellbeing. It has been noted that many of the diseases prevalent in the Aboriginal population—such as heart disease, diabetes and obesity—would benefit from a more varied and nutritionally sound dietary intake and increased exercise.³³ For these reasons alone, the rights of Aboriginal people to subsistence harvest (where there are no competing conservation priorities) should be recognised and encouraged.

22. Vaarzon-Morel P, *Warlpiri Women's Voices: Our lives our history* (Alice Springs: IAD Press, 1995) 6.

23. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 14.

24. Ibid 14–15.

25. See *ibid* 19 & 37.

26. Ibid 38.

27. English AJ, ‘Terrestrial Hunting and Gathering by Aboriginal People in New South Wales’ (1998) 14 *Environmental and Planning Law Journal* 437, 439.

28. Sackett L, ‘The Pursuit of Prominence: Hunting in an Australian Aboriginal community’ (1979) as cited in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [882].

29. For instance in relation to the significant economic opportunities attaching to ‘bioprospecting’ of plants and natural materials on the basis of traditional Indigenous medicinal knowledge. See Part VI, ‘Biotechnological Research and Indigenous Intellectual Property in the Regulation of Resources’, above pp 325–28.

30. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38; English AJ, ‘Terrestrial Hunting and Gathering by Aboriginal People in New South Wales’ (1998) 14 *Environmental and Planning Law Journal* 437, 440.

31. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [887].

32. Davies et al, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38–39.

33. Ibid 39.

Recognising Aboriginal Customary Laws in Relation to Harvesting of Natural Food Resources

The call for recognition of Aboriginal customary law rights to hunt, fish and gather is clearly grounded in the status of Aboriginal people as 'first Australians'. The continuing existence of these rights has been recognised at common law as an incident of native title; although there has been little success in gaining common law recognition of hunting and fishing rights as usufructuary rights distinct from any recognised title in land.³⁴ The primary reason for this is the existence of legislation covering most areas where Aboriginal custom might otherwise be relied upon to found a common law right.³⁵ In these circumstances it is desirable that recognition of customary law harvesting rights include legislative recognition.

Issues Raised in Relation to Legislative Recognition of Aboriginal Harvesting Rights

Purpose of harvesting

Subsistence use

Because of the difficulty of preserving and storing foods under bush conditions, traditional Aboriginal people would usually harvest only the food that they required for their subsistence.³⁶ However, with the development of refrigeration and preservation techniques, contemporary Aboriginal people have the capacity to harvest more food than is required for their immediate consumption. An issue commonly raised in relation to legislative recognition of Aboriginal harvesting rights is whether such recognition should be restricted to subsistence harvesting alone.

Davies *et al* suggest that most contemporary Indigenous hunting, fishing and foraging activity is for



subsistence use of food but that this also includes food that is traded or gifted 'according to [the person's] social and spiritual rights and responsibilities'.³⁷ These responsibilities to kin and obligations under Aboriginal customary law in relation to harvesting food for ceremonial purposes prompted the ALRC's recommendation that recognition involve a 'broad notion of subsistence'.³⁸ The ALRC argued that Aboriginal people were sustained by the land in ways other than simple nutrition and that these other traditional uses of natural food resources should be taken into account in recognition of Aboriginal customary law in this area.³⁹ The Commission agrees with this conclusion.

Commercial use

Traditional harvesting included elements of barter and exchange within an Aboriginal group and, in some cases, between groups. For example, an intended husband would gift food to his promised bride's family (usually in a different group) in exchange for the agreement to marry. Food would also be exchanged for services (such as the manufacture of a spear or canoe to order, or assistance in hunting), goods (such as objects or other types of food) and rights (such as access to waterholes or mineral deposits).⁴⁰ Although, as mentioned above, this trade in food was usually bound up in kinship obligations or in the Aboriginal culture of reciprocity,⁴¹

34. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [62].

35. *Ibid.*

36. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 99. Some foods, such as wild plums, were able to be dried and stored in holes for periods of weeks.

37. Davies *et al*, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 38.

38. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [975] & [1001].

39. *Ibid* [975].

40. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 110–11.

41. For further discussion on this aspect of Aboriginal culture see Part VI, 'The existence of Aboriginal contractual arrangements', above p 274; and Peterson N, 'Demand Sharing: Reciprocity and the pressure for generosity among foragers' (1993) 95 *American Anthropologist* 860.

the Commission recognises that in the contemporary context such trade might be considered to be evidence of commercial application of natural food resources.

The combination of subsistence and trade use of harvested foods, fauna and flora in traditional Aboriginal societies makes the legislative recognition of customary harvesting rights particularly difficult. A submission to the ALRC's 1986 inquiry by the then Western Australian Director of Fisheries and Wildlife gave voice to concerns relating to the potential of commercial exploitation of legislative recognition of traditional harvesting rights.

The care that has been taken in Western Australia in consideration of Aboriginal hunting rights stems from the dual need to recognise traditional and customary practices and at the same time to ensure that people of Aboriginal descent who have adopted European values do not abuse their privileges to the detriment of the overriding interests of conservation. There are cases on record of Aboriginal people involved in extensive parrot nest-robbing, of being exploited by aviculturalists to catch birds on the aviculturalist's behalf and of claiming exclusive rights to take flora, clearly for commercial purposes. The realities of the situation of the tribal and semi-tribal Aboriginal people have nearly total freedom to take wildlife for traditional purposes in this State ... The basic problems concern neither philosophy nor the wording of legislation. They centre on the problem of distinguishing between Aboriginals acting from traditional motives and those who use [legislation] to 'legitimise' clearly illegal activities.⁴²



Taking these concerns into account, the ALRC concluded that a distinction should be drawn between hunting, fishing and foraging for consumption within 'local family or clan groups (which should be regarded as traditional even though elements of barter and exchange are present) and trade, exchange or sale outside the local community, which should be treated in the same way as other commercial dealings with the species in question'.⁴³

Methods of harvesting

Traditional Aboriginal people employed myriad tools and techniques for the harvesting of food. For example, spears or lines with bone or wooden hooks were used for river-fishing; poison (extracted from noxious plants) was sometimes used for billabong fishing; while harpoons and rafts or canoes would be used for open sea fishing.⁴⁴ In some areas Aboriginal people would build stone barriers into the sea to trap fish with the receding tide.⁴⁵ Large game was mostly hunted with spears and, less frequently, with boomerangs or the use of camouflaged pits.⁴⁶ Reptiles and small marsupials were hunted with the use of clubs or sticks, while stone axes were used to chop wood and to extract honeycomb from hollow trees.⁴⁷ Vegetable foods were collected in dilly bags woven from grasses or pandanus fibre, and digging sticks were used to unearth yams and edible roots.⁴⁸

Although there are probably still some Aboriginal people that employ entirely traditional hunting and fishing methods, most have adopted more efficient contemporary tools such as firearms, nylon fishing lines, nets, boats and vehicles. In many cases, and as a direct result of colonialism, the knowledge of how to manufacture and use traditional hunting tools has been irrevocably lost. In these circumstances to insist on the exercise of Aboriginal harvesting rights only by use of traditional methods means effectively to deny Aboriginal people their customary rights to harvest natural food resources.⁴⁹ For this reason the ALRC recommended that 'in determining whether an activity is "traditional", attention should be focused on the *purpose* of the activity rather than the method'.⁵⁰ The appropriate

42. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [976].

43. *Ibid.*

44. Berndt RM & Berndt CH, *The World of the First Australians* (Sydney: Ure Smith, 1965) 100–101.

45. *Ibid.* 101.

46. *Ibid.* 100.

47. *Ibid.*

48. *Ibid.* 100–101.

49. See discussion in ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [977].

50. *Ibid.*

To insist on the exercise of Aboriginal harvesting rights only by use of traditional methods means effectively to deny Aboriginal people their customary rights to harvest natural food resources.

issues are, therefore, whether the harvesting was undertaken for local consumption or ceremonial purposes and whether the person was genuinely exercising his or her rights under Aboriginal customary law.

Proof of traditional harvesting rights at common law

The question whether a person is genuinely exercising an Aboriginal customary right to harvest natural food resources is dependent at law upon proof of those rights. As mentioned earlier, the customary right to fish, hunt or gather has never been accepted in Australia as a distinct usufructuary right divorced from a full determination of native title at common law.⁵¹ In *Mason v Tritton*⁵² the question of the burden of proof of a native title right to fish was examined. In that case, an Aboriginal man had been charged with taking more than the permitted quantity of abalone in breach of fisheries regulations. In his defence against those charges the man argued that he was exercising a traditional customary right to fish that had been exercised by his Aboriginal ancestors 'since time immemorial' without interruption.⁵³

Kirby P (as he then was) set out the 'exacting nature of the evidential burden'⁵⁴ required by the High Court's decision in *Mabo v Queensland [No 2]*⁵⁵ to prove such a claim for common law native title:

- that traditional laws and customs extending to the 'right to fish' were exercised by an Aboriginal

community [in the relevant locality] immediately before the Crown claimed sovereignty over the territory;

- that the [person exercising the rights] is an Indigenous person and is a biological descendant of that original Aboriginal community;
- that the [person exercising the rights] and the intermediate descendants had, subject to [proof of a substantially maintained connection with the land], continued, uninterrupted, to observe the relevant traditional laws and customs; and
- that the appellant's activity or conduct in fishing ... was an exercise of those traditional laws and customs.⁵⁶

Kirby P stressed that evidence of alteration or change to traditional ways was not necessarily fatal to the claim for native title rights;⁵⁷ however, he noted that the claimant would only enjoy native title to the extent that the traditional customs and laws are 'currently acknowledged and observed'.⁵⁸

The difficulty of a person (or, more likely, an Aboriginal group) being able to fulfil the very onerous requirements for proof of a common law customary usufructuary right was also noted by Priestly JA in the same case.⁵⁹ He suggested that the best way to pursue claims to customary law rights was not through the common law, but by virtue of a full determination of native title under the *Native Title Act 1993* (Cth) which, by s 223(2), 'puts beyond doubt the inclusion of native title hunting, gathering or fishing rights and interests within the meaning of native title'.⁶⁰

51. *Mason v Tritton* (1994) 34 NSWLR 572, 597 & 600 (per Priestly JA). However, customary rights independent of title to land or sea have been recognised at common law by courts in Canada. See for instance: *R v Isaac* (1975) 13 NSR (2d) 460 where a right to use reserve land and exploit its resources was recognised; and *R v Taylor* (1982) 62 CCC (2d) 227 where continuing customary hunting and fishing rights were found to exist over land previously ceded to the colonists by treaty. It is perhaps important to note that Aboriginal rights were given constitutional protection in 1982 by s 35(1) of the *Constitution Act 1982* (Canada). Recently the Supreme Court of Canada confirmed that these constitutionally protected rights included traditional hunting, fishing and gathering rights: *R v Powley* [2003] SCC 43.

52. (1994) 34 NSWLR 572.

53. Ibid 595–96.

54. Ibid 584 (per Kirby P).

55. (1992) 175 CLR 1.

56. *Mason v Tritton* (1994) 34 NSWLR 572, 584 (per Kirby P).

57. Victoria Williams notes that the 'courts have accepted the changing nature of Aboriginal traditional laws by allowing defendants to rely upon a native title defence [existing in legislation] even where the activity had not been undertaken strictly in the traditional manner. In *Campbell v Arnold* (1982) 56 FLR 382 the fact that the defendant had used a firearm to hunt was not fatal to his claim that he was acting [in] a traditional manner'. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, Law Reform Commission of Western Australia (LRCWA), Project No 94, Background Paper No 1 (December 2003) 63.

58. *Mason v Tritton* (1994) 34 NSWLR 572, 583 (per Kirby P).

59. Ibid 600 (per Priestly JA).

60. Ibid.

In *Derschaw v Sutton*⁶¹ the Western Australian Court of Criminal Appeal relied upon the reasoning of Kirby P in *Mason v Tritton* in relation to the extent of evidence required to prove a native title right at common law. In *Derschaw* the Aboriginal appellants were charged with contravening fishing regulations, having taken by a prohibited means (nets) a large number of fish to feed those attending the funeral of an important community member. The appellants argued that once a claim to a customary right to fish had been raised, 'the onus was on the prosecution to negative the claim, there being no obligation on the defendant [appellant] to raise a reasonable doubt'.⁶² The Court held that the appellants had adduced insufficient evidence to support the establishment of the right as a native title right pursuant to the decision of the High Court in *Mabo* and as such the evidence was not enough to raise a reasonable doubt as to their guilt.

These cases outline the difficulty of proving a common law case for recognition of traditional harvesting rights, whether as a defence to a criminal charge or otherwise.⁶³ In the Commission's opinion these decisions serve to underline the need for adequate legislative protection of those rights.

Current Legislative Recognition of Aboriginal Harvesting Rights in Western Australia

Aboriginal rights to hunt, fish and forage have been recognised by statute since the early days of colonial government in Western Australia.⁶⁴ The following sets

out the current statutory provisions that have direct relevance to the customary usufructuary rights of Western Australian Aboriginal people. None of these statutes limit or extinguish the usufructuary rights established by s 211 of the *Native Title Act 1993* (Cth) in relation to land that is the subject of a native title determination.⁶⁵

Hunting and Gathering

Under the *Wildlife Conservation Act 1950* (WA) it is an offence to take protected fauna (whether from private land or Crown land) without a licence. It is also an offence to take protected flora from Crown land without a licence or from private land without the permission of the occupier. A fine of \$4,000 applies for any breach of the Act and that fine is increased to \$10,000 for the taking of protected fauna⁶⁶ and for the taking of rare flora.⁶⁷

Section 23 of the *Wildlife Conservation Act 1950* (WA) permits persons of Aboriginal descent to engage in hunting and foraging (of fauna and flora) on Crown land or any other land that is not a nature reserve or wildlife sanctuary⁶⁸ for the purposes of providing food for that person and his or her family, but not for sale.⁶⁹ This exemption is subject to certain restrictions such as the need to gain consent from the occupier of occupied lands, including private land. It is also subject to qualification, or even indefinite suspension, where the Governor considers that any species of flora or fauna taken under the authority of this section are in danger of becoming unduly depleted or that the rights protected by the section are otherwise being abused.⁷⁰

61. (1996) 17 WAR 419.

62. Ibid.

63. It is worth noting here that the right of indigenous peoples to practise their culture and customs under Article 27 of the *International Covenant on Civil and Political Rights*, was raised in argument as a defence to an offence against Tasmanian fisheries regulations in *Dillon v Davies* (1998) 156 ALR 142. However the applicant conceded that he could not succeed with this defence unless he also proved native title rights and interests under the *Native Title Act 1993* (Cth) or alternatively, a common law customary right. Accordingly, the court did not consider this defence.

64. See, for example, the *Preservation of Game Act 1874* (WA) s 13; the *Fisheries Act 1899* (WA) s 11 (which permitted subsistence fishing by traditional Aboriginal methods); and the *Land Act 1898* (WA) s 106 (which permitted customary subsistence harvesting upon and access to all unimproved parts of pastoral leases, whether enclosed or otherwise). More recently Aboriginal hunting and fishing rights have been governed by the *Fauna Protection Act 1950* (WA) s 23; the *Fisheries Act 1905* (WA) s 56(1) (which permitted subsistence fishing by Aboriginal people subject to certain gazetted restrictions including the size and species of catch and the use of certain devices); and the *Land Act 1933* (WA) s 106(2) (which permitted customary subsistence harvesting of resources on unenclosed, unimproved parts of pastoral leases).

65. Section 109 of the *Australia Constitution* would operate to invalidate any state law to the extent of any inconsistency between restrictions imposed by a state law and the provisions of the *Native Title Act 1993* (Cth). It is important to note, however, that while s 211 of the *Native Title Act 1993* (Cth) permits the exercise of certain rights or interests in circumstances where a native title holder would otherwise require a licence for such activity, they are nonetheless subject to laws of general application including laws that prohibit the activity for all persons or laws that only allow the activity under licence for research, environmental protection, public health or public safety purposes. Thus, the conservation ethic in the protection of fauna and flora is able to be preserved even where native title is granted over land.

66. *Wildlife Conservation Act 1950* (WA) ss 16 & 16A.

67. *Wildlife Conservation Act 1950* (WA) s 23F.

68. Nature reserves and marine parks are governed by the *Conservation and Land Management Act 1984* (WA).

69. According to the *Wildlife Conservation Act 1950* (WA) s 23(2) 'the Executive Director may issue a certificate to any person authorising him to sell the skins of kangaroos which he has lawfully taken for food' pursuant to the exemption. It is noted that s 27C places the burden of proving that an exemption applies upon the person claiming the exemption under the Act.

70. In his background paper to this reference, Phillip Vincent notes that 'by regulations made on 14 August 2001 the government indefinitely suspended Aboriginal people's right to hunt dugong, six varieties of turtles, and saltwater and fresh water crocodiles, and to take all flora declared "rare"'. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 13.

However, Aboriginal persons exercising their rights under s 23 are not restricted to the use of traditional hunting methods and, further, are not subject to regulations restricting the use of firearms, snares, nets, traps, poisons and explosives in the taking of fauna.⁷¹

The *Conservation and Land Management Act 1984* (WA) (the CALM Act) prohibits the taking of flora and fauna from nature reserves, state forests or other land designated under the CALM Act,⁷² and from marine parks⁷³ without lawful authority. Currently there is nothing in the CALM Act that exempts Aboriginal people from its provisions or recognises Aboriginal interests in relation to the harvesting of natural resources on CALM Act land.

Fishing

Section 6 of the *Fish Resources Management Act 1994* (WA) provides that:

An Aboriginal person is not required to hold a recreational fishing licence to the extent that the person takes fish from any waters in accordance with continuing Aboriginal tradition if the fish are taken for the purposes of his or her family and not for a commercial purpose.

‘Commercial purpose’ is defined in s 4 of the Act to mean ‘the purpose of sale or any other purpose that is directed to gain or reward’. This would appear to preclude the type of trade or barter within and between Aboriginal communities that is typically associated with the exercise of customary fishing rights.

It is important to note that the exemption expressed in s 6 only applies to the need to obtain a recreational fishing licence. Aboriginal people are still subject to the normal fishing rules and regulations—such as restrictions in regard to the size

of fish taken, bag limits, protected species, conservation areas and seasonal closures of fishing areas—unless there is a contrary determination of native title rights in relation to the area.⁷⁴ Whilst Aboriginal people are not restricted to use of traditional fishing methods under s 6, they are subject to the normal rules that apply to recreational fishing which may preclude the use of traps and nets in certain circumstances.

Access to Land for Customary Harvesting Purposes

As discussed earlier, s 23 of the *Wildlife Conservation Act 1950* (WA) permits access to Crown land for customary harvesting purposes. Section 104 of the *Land Administration Act 1997* (WA) permits access to unenclosed, unimproved parts of pastoral leases for seeking of sustenance by Aboriginal people ‘in their accustomed manner’, whilst the *Aboriginal Affairs Planning Authority Act 1972* (WA) s 32 allows Aboriginal people the exclusive use and enjoyment of Aboriginal land, which includes the right to hunt, fish and forage on that land. There is currently no provision in the *Conservation and Land Management Act 1984* (WA) that recognises Aboriginal interests in harvesting resources on land designated under that Act, including nature and conservation reserves and marine parks.



71. *Wildlife Conservation Regulations 1970* (WA) reg 54 ‘Illegal means and devices’.

72. *Conservation and Land Management Regulations 2002* (WA) reg 8. The penalty applied to breach of this provision is a fine of \$2,000.

73. Marine fauna include dolphin, dugong, whale, sealion, seal, manta ray, sea turtle and whale sharks: *Conservation and Land Management Act 1984* (WA) s 101C. The penalty applied to breach of this provision is \$10,000 or one year imprisonment.

74. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 25. It is noted that the decision of the Western Australian Court of Criminal Appeal in *Wilkes v Johnsen* [1999] WASCA 74 would apply in relation to activities performed in relation to rights and interests granted to native title holders pursuant to s 211 of the *Native Title Act 1993* (WA). For further discussion of the decision in this case see Part V, ‘Native Title Defence’, above pp 178–79.

Improving Recognition of Aboriginal Harvesting Rights in Western Australia

Priorities of Recognition

There is no doubt that customary harvesting activities remain important to Aboriginal people and in many cases would be considered vital to the maintenance of Aboriginal culture.⁷⁵ Further, as discussed in Part IV, there are international conventions that support the recognition of the rights of indigenous peoples to be free to enjoy their culture and practise their customs,⁷⁶ including customary use of land and resources.⁷⁷ Nonetheless, with encroaching threats to Australia's biodiverse regions,⁷⁸ the conservation of native species and habitats must now be regarded as having priority over all other interests in land, including the interests of indigenous peoples. In its 1986 report *The Recognition of Aboriginal Customary Laws*, the ALRC considered the following hierarchy of priorities as justified:

1. conservation and other identifiable overriding interests (such as safety, rights of innocent passage, shelter and safety at sea);
2. traditional hunting and fishing; and
3. commercial and recreational hunting and fishing.⁷⁹

The ALRC observed that conservation principles 'may require restrictions on traditional hunting and fishing interests', even when Aboriginal people are given control over resources on Aboriginal land.⁸⁰ It is unlikely, however, that Aboriginal people would object to the prioritisation of conservation in regard to land and natural resources. It is noted above that Aboriginal people employed traditional methods to conserve species and resources, thereby managing the continent in a sustainable way. In this regard it has been observed:

While it is important to not take a romantic view of Aboriginal-nature relationships, it is clearly the case that Indigenous Australians have acted and still act with intent in relations with their environment, that their concerns go beyond mere consumption, and that the outcomes of their actions which have the effect of conserving species are not merely incidental.⁸¹

Principle 22 of the *Rio Declaration* (developed at the United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in 1992) recognised that indigenous peoples 'have a vital role in environmental management and development because of their knowledge and traditional practices'.⁸² UNCED urged participating countries to recognise and support the identity, culture and interests of indigenous peoples and 'enable their effective participation in the achievement of sustainable development'.⁸³

With these observations in mind, the Commission asserts its support for the above hierarchy of priorities, which places conservation above Aboriginal customary interests; however, the Commission urges government and its conservation bodies to actively consult, engage with and involve Aboriginal people in decision-making and program application in respect of conservation of land and resources in Western Australia.

Proposal 72

That the recognition of Aboriginal customary laws relating to hunting, fishing and gathering be subject to the genuine interests of conservation of Western Australia's diverse biological resources, but that they take a higher priority than commercial and recreational interests in the same resources.

That, in the application of conservation programs and decision-making in respect of conservation of land and resources in Western Australia, the Western Australian government and its conservation bodies actively consult, engage with and involve Aboriginal people.

75. English AJ, 'Terrestrial Hunting and Gathering by Aboriginal People in New South Wales' (1998) 14 *Environmental and Planning Law Journal* 437, 438.

76. Such as, for example, the *International Covenant on Civil and Political Rights*, Article 27.

77. *Convention on Biological Diversity* 1992, Article 8(j).

78. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002) 'Why we Need New Biodiversity Conservation Legislation' <http://www.naturebase.net/biocon_act_consult_text.html>.

79. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [1001].

80. *Ibid.*

81. Worboys G, Lockwood M & De Lacy T, *Protected Area Management: Principles and Practice* (Sth Melbourne: Oxford University Press, 2001) ch 15, 'Indigenous people and protected areas'. The authors cite Langton M, *Burning Questions: Emerging environmental issues for Indigenous peoples in northern Australia* (Darwin: Centre for Indigenous Natural and Cultural Resource Management, Northern Territory University, 1998) in support of this proposition.

82. United Nations Conference on Environment and Development (UNCED), *Rio Declaration*, principle 22.

83. *Ibid.*

The Need for Clarity in the Legislative Recognition of Customary Harvesting Rights

In his background paper to this reference Phillip Vincent recommended that 'protection for Aboriginal people against prosecution for hunting, gathering and fishing pursuant to Aboriginal law and custom needs to be strengthened to ensure that the protection is granted absolutely by Parliament and not merely discretionary to the government of the day'.⁸⁴ In support of this recommendation Vincent drew attention to the government's capacity to suspend or restrict the rights of Aboriginal people under s 23 of the *Wildlife Conservation Act 1950* (WA) in the event that the Governor considers that the rights are being abused or that certain species of fauna or flora are being unduly depleted.

In light of the discussion above, the Commission accepts that limitations on Aboriginal customary harvesting rights are justified for conservation purposes and that the qualification on the exemption provided by s 23 is intended to protect and conserve species that are at risk of extinction or are otherwise threatened. However, the Commission is genuinely concerned about the burden placed on Aboriginal people to discover the state of the law in regard to restrictions placed from time-to-time upon the s 23 exemption.⁸⁵

During the Commission's consultations it became clear that many Aboriginal people were unaware of the nature and extent of statutory exemptions in relation to the customary harvesting of fish, fauna and bush foods. Some perhaps believe erroneously that, as Aboriginal people, they possess the absolute right to hunt, fish and gather as long as they do so in a traditional manner.⁸⁶ Others might be aware of, for example, the exemption from the statutory requirement to obtain a recreational fishing licence, but be ignorant of the need to comply with rules regarding

size of catch, bag limits, etc. Indeed in many cases the extent of the exemptions for Aboriginal people exercising customary harvesting rights is not clear on the face of the legislation and may be hidden in a maze of rules and regulations that are not readily accessible. Moreover, the rules and regulations are often subject to change by mere declaration in the *Government Gazette*, such that it may be acceptable for Aboriginal people to harvest one species of fish or fauna on one day but illegal the next.

Presumably wildlife and fisheries officers do their best to advise Aboriginal people of restrictions on the exemptions that otherwise protect them from prosecution, but it is conceivable that these officers may themselves be unaware of changes to restrictions. The recent High Court judgment in the Western Australian case *Ostrowski v Palmer*⁸⁷ highlights the fact that the public, including Aboriginal people, cannot rely in good faith upon information given by fisheries officers (and by extension, wildlife or CALM officers) as to the relevant prohibitions attaching to harvesting activities, whether by licence or otherwise. In *Palmer* the fact that the fisherman had been given erroneous written material by a fisheries officer about prohibited fishing areas was not enough to establish a defence under s 24 of the *Criminal Code* (WA) as to 'an honest and



84. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA, Project No 94, Background Paper No 15 (June 2005) 14.

85. The Commission notes that currently there are 246 taxa of rare flora, six varieties of turtle, two types of crocodile and one species of marine fauna that Aboriginal people are forbidden to take under s 23. See *Wildlife Conservation Notice 2004* and *Wildlife Conservation Regulations 2003* (WA) reg 63.

86. See, for example the summary of the Commission's consultations in Bunbury where at least one respondent believed that an Aboriginal acquaintance was charged with contravention of fisheries legislation for failing to take marron in a traditional manner. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 11.

87. (2004) 206 ALR 422; [2004] HCA 30 (16 June 2004).

reasonable, but mistaken, belief in the existence of any state of things' when he fished in a prohibited area. The High Court held that this was not a mistake of fact, but one of law: he had erroneously believed that no law prohibited him from fishing in the relevant area.⁸⁸ As s 22 of the *Criminal Code* (WA) makes clear, unless knowledge of the law is expressly declared to be an element of the offence, ignorance of the law is no excuse.

The authorities further suggest that Aboriginal persons harvesting fauna, flora and fish under the belief that they have an honest claim of right under customary law would be unlikely to establish a defence to prosecution⁸⁹ in the absence of a native title determination.⁹⁰ (Although, as discussed above in Part V,⁹¹ there may be a case for establishing a defence in relation to a restriction to a statutory exemption recognising customary harvesting rights, such as that found in s 23 of the *Wildlife Conservation Act*.) In these circumstances—and recognising the difficulty of remote Aboriginal people, in particular, to establish the currency of regulations or notices restricting the operation of the exemption in s 23 of the *Wildlife Conservation Act*—the Commission believes that all reasonable steps should be made by government to communicate to Aboriginal people the extent of harvesting exemptions in respect of Aboriginal people and any restrictions placed from time-to-time upon those exemptions. The Commission suggests that communication of these matters might be best achieved by establishing a dedicated section on the DIA, CALM and Department of Fisheries websites, as well as providing notices and information to Aboriginal communities through the vehicle of Aboriginal community councils, Aboriginal land councils, Aboriginal radio stations, Aboriginal cultural organisations, native title working groups and, when established, the community justice groups proposed in Part V of this paper.

Proposal 73

That relevant Western Australian government authorities take all reasonable steps to enhance communication of harvesting exemptions available to Aboriginal people and of any restrictions placed from time-to-time upon those exemptions.

Improving Recognition – Hunting and Gathering

As mentioned above, the *Wildlife Conservation Act 1950* (WA) allows Aboriginal people to hunt fauna and gather flora on Crown land and other land (with the occupier's consent) for the purposes of food. Currently the Act does not provide exemption for fauna, flora or natural products taken for therapeutic, artistic, cultural or ceremonial purposes. However, as discussed in an earlier section dealing with the bioprospecting of native flora,⁹² the Western Australian government is presently undertaking a detailed consultative review of the *Wildlife Conservation Act* and is in the process of drafting replacement legislation (the *Biodiversity Conservation Act*) and updating the state's conservation strategy. The 2002 consultation paper for the new Act states that:

The Act will respect native title and protect customary use of biological resources that takes place in accordance with traditional cultural practices. To this end, the existing rights of Aboriginal people to take animals and plants for food will be extended to guarantee the right of Aboriginal people to use biological resources for any customary purpose.⁹³

Such development would appear to implement the ALRC's recommendation that legislative recognition of Aboriginal customary law rights to hunt and gather reflect a 'broad notion of subsistence' which includes ceremonial and other non-commercial purposes. The

88. Ibid.

89. The High Court's decision in *Walden v Hensler* (1987) 75 ALR 173—in relation to Queensland fauna conservation legislation which does not provide for an Aboriginal harvesting exemption—suggests that the defence of honest claim of right will not be available where an activity is prohibited as a matter of general application. To the Commission's knowledge this defence is untested in relation to restrictions placed upon the Aboriginal customary harvesting exemption in s 23 of the *Wildlife Conservation Act 1950* (WA). It should also be noted that the Commission could not locate any cases where a defendant has relied on the defence of honest claim of right in relation to a charge of prohibited taking of flora, fauna or fish since the High Court's decision in *Mabo*. It is clear that most defendants will now seek to rely upon a defence of native title at common law: see, for example, *Wilkes v Johnsen* [1999] WASCA 74.

90. The High Court's decision in *Yanner v Eaton* [1999] HCA 53 (7 October 1999) makes clear that the vesting in the Crown of property in natural resources (as is found in the *Wildlife Conservation Act 1950* (WA) s 22) cannot be assumed to extinguish native title. There must be clear and plain legislative intention to extinguish the native title rights of Aboriginal peoples.

91. See Part V, 'Honest Claim of Right', above p 175.

92. See Part VI, 'Biotechnological Research and Indigenous Intellectual Property in the Regulation of Resources', above pp 325–28.

93. Western Australian Government, *Biodiversity Conservation Act Consultation Paper* (December 2002) 'Use of Biological Resources by Indigenous people', <http://www.naturebase.net/biocon_act_consult_text.html>.

Commission also understands that the government may be considering the extension of rights of Aboriginal people to subsistence hunt and gather to land (and presumably marine parks) designated under the *Conservation and Land Management Act 1984* (WA), subject to the existence of contrary conservation management plans.⁹⁴ The Commission strongly supports this development.

Proposal 74

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be subsumed into future wildlife and biological resource conservation legislation and be expanded to include the taking of flora and fauna (subject to conservation restrictions placed on certain species from time-to-time) for non-commercial purposes including for food, artistic, cultural, therapeutic and ceremonial purposes according to Aboriginal customary law.

That the exemption described above also apply to land designated under the *Conservation and Land Management Act 1984* (WA) subject to the provisions of conservation management plans over such land.

have an important role in reducing the number of feral animals in Western Australia.⁹⁷

Proposal 75

That the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA)—and its successor in future conservation legislation—remain applicable to all fauna and flora (subject to conservation restrictions), including introduced species.

Barter and exchange

The nature of barter and exchange of food items within Aboriginal communities is dealt with above under the heading 'Purpose of harvesting'.⁹⁸ It was noted there that the ALRC recommended that the elements of barter and exchange within clan groups be recognised as integral to Aboriginal customary law, but that 'trade, exchange or sale outside the local community should be treated in the same way as other commercial dealings with the species in question'.⁹⁹ Currently s 23 permits harvesting for the purpose of providing 'sufficient' food for 'family', but not for sale. 'Family' is not defined in the *Wildlife Conservation Act 1950* (WA) but, in the context of Aboriginal persons, should be more broadly defined than a person's immediate 'nuclear' family.

It is the Commission's tentative view that the taking of fauna and flora for non-commercial purposes under the Aboriginal exemption should include taking sufficient for the purpose of satisfying kin obligations *within, but not outside, the local community*. However, the Commission notes a recent review into fisheries management in Western Australia which recommends that an exemption for Aboriginal customary fishing encompass 'the elements of barter or exchange of fish so long as it occurs *within or between Aboriginal communities*, is for other food or for non-edible items other than money, and if the exchange is of a limited and non-commercial nature'.¹⁰⁰ The Commission accepts

Feral animals

Despite its clear foundation in traditional harvesting rights, Aboriginal people are not restricted to the taking of native fauna under the s 23 exemption. Aboriginal people are known to harvest introduced feral animals such as rabbits, pigs, buffalo, donkeys and camels for subsistence purposes.⁹⁵ In some cases these introduced species have almost completely replaced indigenous species in Aboriginal peoples' diets. This may be because the indigenous species traditionally hunted has now died out or because the introduced species are more numerous and perhaps easier to hunt.⁹⁶ The Commission sees no reason why recognition of customary harvesting rights should be limited to native animals and acknowledges that Aboriginal hunters may

94. Currently there is nothing in the *Conservation and Land Management Act 1984* (WA) that exempts Aboriginal people from its provisions or recognises Aboriginal interests in relation to harvesting of natural resources on CALM Act land.

95. Davies *et al*, *Sustaining Eden: Indigenous community wildlife management in Australia* (International Institute for Environment and Development, 1999) 45.

96. Ibid 38.

97. The Commission notes that the ALRC made a similar recommendation in its 1986 study.

98. See above pp 369–70.

99. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [1001].

100. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 31.

that there may be legitimate reasons for accepting a different regime in relation to fauna and flora than in relation to fish. In particular, the Commission notes that fish stocks may renew more quickly and have a higher reproduction rate than fauna such as the Western Grey Kangaroo¹⁰¹ and other species popular with Aboriginal hunters. In these circumstances the Commission seeks submissions regarding the potential of permitting non-commercial barter or exchange under the Aboriginal exemption and the restrictions, if any, that should be placed upon such exchange.

Invitation to Submit 16

The Commission invites submissions as to whether the non-commercial barter or exchange of fauna or flora taken by Aboriginal persons pursuant to the exemption currently provided by s 23 of the *Wildlife Conservation Act 1950* (WA) be permitted and, if so, what, if any, restrictions should be placed upon such exchange.

Commercial harvesting

Currently, any person may apply for a licence under s 23C of the *Wildlife Conservation Act* to harvest flora¹⁰² from Crown land for commercial purposes, including for such things as perfume production, bush food, floristry and therapeutic use. Typically conservation considerations will inform the grant of such licences and their conditions. A recent article in the *Weekend Australian Magazine* highlighted the significant economic benefits that commercial harvesting of flora can provide for Aboriginal people in Western Australia, particularly for those in remote areas that have little to no viable alternative industry.¹⁰³ However, the writer also warned of the vulnerability of some communities to exploitation by commercial harvesters that use Aboriginal traditional knowledge, expertise and labour for minimal return to the community.¹⁰⁴

The Commission believes that Aboriginal people should be encouraged to commercially exploit their traditional knowledge of the land and its natural resources by undertaking commercial harvesting of fauna and flora in their traditional lands. However, taking conservation as its priority, it is the Commission's view that any commercial harvesting of natural resources (whether for food or other purposes) by Aboriginal people must be subject to government-controlled licensing. Of course, there may well be arguments for licensing conditions to be relaxed, for fees to be waived and for a certain number of licences (particularly in competitive industries such as sandalwood harvesting) to be set aside exclusively for Aboriginal communities. The review of the *Wildlife Conservation Act* and its replacement with new biodiversity conservation legislation offers an excellent opportunity for the state to explore its current licensing regime and investigate ways that it can be improved to assist Aboriginal people to develop commercial harvesting opportunities in Western Australia.

Improving Recognition – Fishing

In May 2003 the Aboriginal Fishing Strategy Working Group released its draft report on the establishment of an Aboriginal fishing strategy in Western Australia (the draft AFSWG report).¹⁰⁵ The report was comprehensively researched and included significant consultation with Aboriginal people and key stakeholders across the state. The draft AFSWG report listed a total of 39 recommendations for change to fisheries management and regulations to effect recognition of customary fishing practices in Western Australia. The Commission is aware that a final report including recommendations has now been drafted, although it is yet to be publicly released. At the time of writing this Discussion Paper, the Commission was unable to obtain a copy of this final report;¹⁰⁶ the information contained in this section therefore relies

101. The Western Grey Kangaroo generally reproduces at the rate of a single offspring on a seasonal basis with a gestation period of approximately 35 days and with their young spending up to 298 days in the pouch. The reproduction rate of the Western Grey Kangaroo and of other marsupials and land mammals are also subject to environmental stressors such as drought. See <<http://www.australianwildlife.com.au/features/kangaroo.htm#Reproduction>>.

102. Licences may also be obtained under s 17 of the *Wildlife Conservation Act 1950* (WA) for the taking of fauna. However, Aboriginal persons taking fauna under licence for commercial purposes must abide by the restrictions on the means of taking that apply to the rest of the community under the *Wildlife Conservation Regulations*.

103. Laurie V, 'Bush Bounty', *The Weekend Australian Magazine*, 20–21 August 2005, 30–31.

104. Ibid. The article mentions the case of a very small community at Ullula, southwest of Wiluna, where Aboriginal women had been hired by 'city-based' commercial harvesters to collect seed for a fraction of its commercial value. The Office of Aboriginal Economic Development apparently assisted the community to negotiate a direct contract with a local mine that required native seeds for rehabilitation of the land.

105. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003).

106. However, should the AFSWG final report be available before the Commission publishes its own Final Report on the Aboriginal customary laws reference, the recommendations will be taken into account.

on the material and recommendations contained in the draft AFSWG report, in addition to other relevant reports and documents.

Recognition of customary fishing

The draft AFSWG report found that there was a need for a discrete Aboriginal fishing strategy in Western Australia that recognises customary fishing as a practice 'clearly separated from other forms of fishing in fisheries legislation and policy'.¹⁰⁷ It was acknowledged that the current exemption provided by s 6 of the *Fish Resources Management Act 1994* (WA) was not enough to discharge the obligations placed on governments by the various international conventions, discussed earlier, that assert the rights of indigenous people to be free to practise and enjoy their own culture. It was also acknowledged that the state government's commitment to the Aboriginal peoples of Western Australia in its document *A New and Just Relationship Between the Government of Western Australia and Aboriginal Western Australians*

recognises that Aboriginal people have continuing rights and responsibilities as the first peoples of Western Australia, including traditional ownership and connection to land and waters. These rights inherently incorporate the right of Aboriginal people to continue to fish in a manner customary to them.¹⁰⁸

It was noted in the draft AFSWG report that '[r]ecognising customary fishing within fisheries management does not create a new form of fishing, but identifies an existing fishing practice and purpose. Aboriginal people consulted were generally very candid about the fact that they do not presently fish in accordance with the existing recreational fishing rules if those rules are inconsistent with customary fishing needs'.¹⁰⁹ It was considered that the recognition of customary fishing practices and the involvement of Aboriginal people in fisheries resource management would be beneficial both to fishing authorities and to Aboriginal people.

The draft AFSWG report defines customary fishing in the following way:



Customary fishing:

- (a) applies to persons of Aboriginal descent; and
- (b) who are fishing for the purposes of satisfying personal, domestic, ceremonial, educational, or non-commercial communal needs; and
- (c) who are accepted by the Aboriginal community in the area being fished as having a right to fish in accordance with Aboriginal tradition.¹¹⁰

In respect of (c), the draft AFSWG report recommended that the question of who is accepted under customary law as possessing a right to fish in a certain area be solely a matter for the Aboriginal community concerned. This accords with the Commission's view expressed throughout this paper in regard to establishing the content and extent of Aboriginal customary law in Western Australia.

Other recommendations relating to the recognition of customary fishing in Western Australia are that the elements of barter and trade within and between communities be accepted as part of customary fishing rights (see above) and that customary fishing not be limited to the use of traditional fishing methods or the taking of particular species.¹¹¹ However, in harmony with the views expressed by this Commission and by the ALRC, the draft AFSWG report held that conservation, sustainability and biodiversity objectives are paramount and that the 'recognition of Aboriginal fishing rights and practices [should] not exceed the obligation to protect fish for future generations'.¹¹² For that reason,

107. Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) 35.

108. *Ibid* 33.

109. *Ibid* 34.

110. *Ibid* 30.

111. *Ibid* 31–32.

112. *Ibid* 21.

recommendation 8 of the draft AFSWG report sets out customary fishing parameters which allow the Minister to regulate, within a strict framework established by consultation with Aboriginal fishing interests, 'any customary fishing activities that threaten sustainability or are inconsistent with Aboriginal tradition'.¹¹³

Importantly, Aboriginal customary fishing will not be regulated by inappropriate recreational fishing rules under the draft AFSWG strategy. Customary fishing is recognised as a positive, existing right¹¹⁴ and as a distinct fishing sector to 'be given the same level of engagement in consultative and management processes as the recreational and commercial fishing sectors'.¹¹⁵

National Indigenous Fishing Technical Working Group

In March 2004 the National Indigenous Fishing Technical Working Group (NIFTWG), which includes representatives of Indigenous bodies, most state and territory governments,¹¹⁶ and national commercial and recreational fishing interests, endorsed the *Principles Communiqué on Indigenous Fishing* which provides that:

1. Indigenous people were the first custodians of Australia's marine and freshwater environments: Australia's fisheries and aquatic environment management strategies should respect and accommodate this.
2. Customary fishing is to be defined and incorporated by governments into fisheries management regimes, so as to afford it protection.
3. Customary fishing is fishing in accordance with relevant Indigenous laws and customs for the purpose of satisfying personal, domestic or non-commercial communal needs. Specific frameworks for customary fishing may vary throughout Australia by reference, for example, to marine zones, fish species, Indigenous community locations and traditions or their access to land and water.

4. Recognition of customary fishing will translate, wherever possible, into a share in the overall allocation of sustainable managed fisheries.
5. In the allocation of marine and freshwater resources, the customary sector should be recognised as a sector in its own right, alongside recreational and commercial sectors, ideally within the context of future integrated fisheries management strategies.
6. Governments and other stakeholders will work together to, at minimum, implement assistance strategies to increase Indigenous participation in fisheries-related businesses, including the recreational and charter sectors.
7. Increased participation of Indigenous people in fisheries related businesses and fisheries management, together with related vocational development, must be expedited.¹¹⁷

The draft AFSWG report appears to apply each of the above principles in its recognition of customary fishing. The strategy recommended by the draft AFSWG report also meets the 'Recommended Pathways Matrix: Pathway 2' of the NIFTWG,¹¹⁸ which encourages the development of government policy based on the recognition of defined, non-commercial customary fishing rights and processes that increase Aboriginal involvement and economic opportunities in marine and fisheries related businesses.¹¹⁹

Aboriginal involvement in fisheries management and economic development

The draft AFSWG report made a number of recommendations to enhance Aboriginal involvement in fisheries resource management in Western Australia. In addition to improving consultation processes and establishing 'joint management or cooperative decision-making processes between the Department of Fisheries and Aboriginal interests', the report recommended that the Department develop an Aboriginal employment policy and identify and establish opportunities for joint research programs and initiatives.¹²⁰

113. Ibid 44–46, recommendation 8.

114. Ibid 38, recommendation 5.

115. Ibid 56, recommendation 12.

116. The communiqué has been endorsed by the governments of New South Wales, Western Australia, South Australia, Victoria, Tasmania and the Northern Territory. The Commonwealth government has assisted the NIFTWG process.

117. National Indigenous Fishing Technical Working Group, 'The Principles Communiqué on Indigenous Fishing' (National Native Title Tribunal, 2004) <<http://www.nntt.gov.au/publications/data/files/The%20Principles%20Communique.pdf>>.

118. National Indigenous Fishing Technical Working Group, 'Recommended Pathways Matrix' (National Native Title Tribunal, 2004) <<http://www.nntt.gov.au/publications/data/files/Recommended%20Pathways%20Matrix.pdf>>.

119. Ibid.

120. See Franklyn EM, *Aboriginal Fishing Strategy: Recognising the past, fishing for the future*, Fisheries Management Paper No 168 (Perth: Department of Fisheries, May 2003) recommendations 12–27.

The draft AFSWG report also made a series of recommendations relating to the economic development of the Aboriginal fishing sector including the establishment of an Indigenous Fishing Fund 'to be created by the state government to assist in the purchase of tradeable fishing authorisations on the open market for the benefit of Indigenous Western Australians'.¹²¹ In accordance with Principle 6, set out above, the draft AFSWG report also examined and made recommendations in respect of Aboriginal involvement in the commercial aquaculture and aquatic charter industries in Western Australia.¹²²



The Commission's view

The Commission supports the recommendations of the draft AFSWG report in relation to the recognition of customary fishing in Western Australia and the enhanced involvement of Aboriginal people in fisheries resource management, including in the research and commercial sectors. The draft AFSWG report appears to be a thoroughly researched document which is clearly receptive to the views and interests of all fishing sectors in Western Australia: its recommendations reflect the Commission's hierarchy of priorities in the recognition of customary harvesting rights, as well as provide the Aboriginal fishing sector with legislative clarity. Importantly, the recommendations appear to positively answer the concerns raised by Aboriginal people during the Commission's consultations. The Commission has nothing useful to add to these recommendations and encourages the Western Australian government to implement the recognition strategies contained in the draft AFSWG report forthwith.

Improving Recognition – Access to Land for Customary Harvesting Purposes

In its 1986 report on the recognition of Aboriginal customary laws the ALRC asserted that '[i]t is reasonable that Aborigines be accorded access to traditional lands

for the purposes of hunting, fishing and gathering, whether these lands are unalienated Crown lands or subject to leasehold or other interests'.¹²³ As mentioned above, s 23 of the *Wildlife Conservation Act 1950* (WA) permits access to unalienated Crown land and, with the permission of the occupier, to private land for the purposes of customary harvesting activities. The Commission has proposed that this access and harvesting exemption be extended to nature reserves and other land designated under the CALM Act.

Access to pastoral lease land for the purposes of customary harvesting is governed by s 104 of the *Land Administration Act 1997* (WA) which provides:

Reservation in favour of Aboriginal persons

Aboriginal persons may at all times enter upon any unenclosed and unimproved parts of the land under a pastoral lease to seek their sustenance in their accustomed manner.

In Western Australia 36 per cent of the state's land area is covered by pastoral leases, the leaseholds of which expire in 2015.¹²⁴ The Aboriginal Access and Living Areas Working Group (AALAWG) was established to inform government of the interests and aspirations of Aboriginal people in relation to gaining access and tenure over pastoral lands prior to leasehold renewal.¹²⁵ In particular, the AALAWG was asked to consider the terms of the reservation for Aboriginal people contained in s 104 of the *Land Administration Act*.

121. Ibid 90, recommendation 31.

122. Ibid 97–98, recommendations 38 & 39.

123. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [989].

124. Aboriginal Access and Living Areas Working Group (AALAWG), 'Aboriginal Access and Living Areas Pastoral Industry Working Group Final Report' (September 2003) <<http://www.dpi.wa.gov.au/pastoral/documents/aboriginalaccess.rtf>> 9. It is noted that there are presently six pastoral leases held by the Aboriginal Lands Trust and nine held by other entities (such as the Indigenous Land Corporation) for the benefit of Aboriginal interests. See Western Australia, *Parliamentary Debates*, Legislative Council, 4 December 2003, 14214 (Mr Ken Travers).

125. Ibid.

Section 104 access

The terms of the reservation for Aboriginal access to pastoral leases contained in s 104 have not changed since 1934.¹²⁶ The AALAWG has observed that:

[Section 104] has never been effective in its apparent objective of guaranteeing Aboriginal access to pastoral lease land. This has been a source of concern to the main Aboriginal and pastoral stakeholders; to the former because reportedly significant numbers of Aboriginal people remain unable to access lands to which they have a traditional and/or historical connection, and to pastoralists because the general nature of the access reservation appears to suggest a right of untrammelled access to all pastoral leases by any of the State's Aboriginal groups.¹²⁷

In particular, the AALAWG found that the generic application of s 104 to all Aboriginal persons and all pastoral leases, and the undefined terms such as 'accustomed manner', 'sustenance' and 'unenclosed and unimproved' created problems for both pastoral and Indigenous interests which sought clarification of the rights guaranteed under the section.¹²⁸ It was recommended that s 104 be amended to provide that access to land be limited to those Aboriginal people with a traditional and/or historical association with the relevant land and that, in future, all pastoral leases include conditions requiring the leaseholder to reach an access agreement with traditional owners.¹²⁹ Access agreements would feature such things as codes of conduct for both parties, joint responsibilities in conservation and land management, and dispute resolution procedures.¹³⁰ In the event that an access agreement could not be reached, it was recommended that one be arbitrated between the parties to ensure that Aboriginal rights of access are protected.¹³¹

The Commission supports amendment to s 104 to clarify the rights and responsibilities of traditional owners and leaseholders in relation to land, the subject of a pastoral lease; however, it notes that at the time of writing no changes had been made to s 104 of the *Land Administration Act* to reflect the recommendations of the AALAWG.

Use of Firearms for Customary Harvesting

In its report the AALAWG made the pertinent observation that, although the use of firearms may be accepted as coming within the definition of 'accustomed manner' in s 104, their use on Crown land is tightly controlled by the *Land Administration Act*.¹³² Under s 267 of the Act it is an offence to discharge a firearm on Crown land without the permission of the Minister or 'reasonable excuse'. The penalty for this offence is a \$10,000 fine. The AALAWG recommended that, in relation to pastoral leases, the use of firearms by Aboriginal hunters be included as part of the 'code of conduct' in the relevant access agreement.¹³³

Of course, the prohibition against discharging firearms on Crown land extends to the exercise of customary harvesting rights on Crown land under exemptions provided by other Western Australian statutes, such as the *Wildlife Conservation Act 1950* (WA). It was mentioned earlier that the regulations regarding methods of taking fauna under that Act did not apply to Aboriginal people exercising their rights under s 23.¹³⁴ However, it appears that Aboriginal people may nevertheless be subject to prosecution under s 267 of the *Land Administration Act* if they employ firearms in their customary hunting activities on Crown land.¹³⁵ Although the Commission is not aware of any cases coming before the courts on this matter it considers that the issue would benefit from legislative clarification.

Proposal 76

That s 267 of the *Land Administration Act 1997* (WA) be amended to make clear the legislative intention in relation to the use of firearms for customary hunting on Crown land pursuant to exemptions contained in s 104 of the *Land Administration Act 1997* (WA) and s 23 of the *Wildlife Conservation Act 1950* (WA).

126. Ibid 11.

127. Ibid 10.

128. Ibid 11.

129. Ibid 4. The working group also recommended that a facility for the registration of land access agreements be established but that working informal 'handshake' agreements between pastoral leaseholders and Aboriginal people be respected.

130. Ibid 5.

131. Ibid 13.

132. Ibid.

133. Ibid.

134. Although there are legitimate arguments for prescribing restrictions on unacceptable means of taking fauna by Aboriginal hunters, including that the use of certain snares and traps (which are otherwise illegal) may cause the animal unnecessary distress and pain.

135. It was considered by the AALAWG that Aboriginal people may have a case for arguing reasonable excuse in defence of a charge under s 267 if they have a determination of native title which protects their customary harvesting rights. AALAWG, 'Aboriginal Access and Living Areas Pastoral Industry Working Group Final Report' (September 2003) <<http://www.dpi.wa.gov.au/pastoral/documents/aboriginalaccess.rtf>> 13.

PART IX

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Evidence

Evidence is the term used to describe the information upon which a court bases its decision. Evidence of a fact is something that will satisfy a court that the fact exists. Evidence can take many forms; for example, the court may be told by a witness that the fact exists, or be shown a document which records the fact. This information will only become evidence if it is properly proved. Evidence that is properly proved is described as 'admissible'. Information that cannot be taken into account by the court (because of the operation of the rules of evidence or the *Evidence Act*) is described as 'inadmissible'. When the court makes a decision it can only take into account information that has become evidence; that is, it has been proved in accordance with the rules of evidence.

In Western Australia the common law (or judge-made) rules of evidence and the *Evidence Act 1906* (WA) govern the way in which information can be admitted into evidence. The *Evidence Act* is not a code of laws¹ setting out the manner in which courts in Western Australia must receive evidence; rather, it is a collection of miscellaneous provisions that have been enacted from time to time to deal with specific circumstances. The provisions of the *Evidence Act* do not replace the common law rules of evidence; they operate in addition to them.² If Aboriginal customary law is to be recognised and taken into account by the Western Australian legal system, then careful consideration must be given to the manner in which customary law is proved to ensure that it may be received as evidence by the courts.

Proof of Customary Law

In order to consider the manner in which Aboriginal customary law is proved, it is not necessary to define customary law.³ Throughout the consultations for this reference it was repeatedly stressed that there is no single system of customary law that applies to all Aboriginal people.⁴ It will therefore be necessary for the courts to hear information about customary law considerations on a case-by-case basis. Thus, in most matters in which a party seeks to have the court take customary law into account it will be necessary for evidence about customary law to be presented to the court,⁵ either through witnesses or documents. In the consultations in Broome it was observed that 'there is problem for the courts in informing themselves' about Aboriginal customary law.⁶ The reason for this problem is that the present rules governing evidence are not well suited to the provision of information about Aboriginal customary law.

Clash of cultures

When considering the way in which information about customary law can be provided to the courts it becomes apparent that there is a clash of cultures between the Australian legal system and Aboriginal systems of knowledge. Former National Native Title Tribunal member, Peter Gray, illustrates this clash of cultures in the context of proving a native title claim by adopting the 'mirror world approach'. He urges those considering this question to

1. By contrast the Commonwealth has enacted the *Evidence Act 1995* (Cth) (part of the uniform Evidence Acts initiative), which attempts to codify the rules of evidence applicable to proceedings in courts exercising federal jurisdiction. For a fuller discussion, see Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [46,050]–[46,070].
2. The *Evidence Act 1906* (WA) provides in section 5 that the provisions of the Act are in addition to, and not in derogation of, any powers, rights or rules of evidence existing at common law.
3. Definitional matters relating to Aboriginal customary law are considered in Part III 'Recognition of Aboriginal Customary Law', above pp 55–64.
4. See Part III 'Recognition of Aboriginal Customary Law', above pp 55–64. See also Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 18; *Rockingham*, 9 December 2002, 35; *Broome*, 17–19 August 2003, 21, 23 & 24.
5. It is important to note that sentencing is an exception to this. By section 15 of the *Sentencing Act 1995* (WA) the court can 'inform itself in any way it thinks fit' and is therefore not bound by the rules of evidence. The courts have, however, stated that even in sentencing proper material must be presented to the court. See Part V 'Evidence of Aboriginal Customary Law in Sentencing', above pp 221–24.
6. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 23.

picture a situation in which a number of pastoral leaseholders are required to prove their title to land. They are required to do so before a group of old Aboriginal people who are sitting around on the ground. As evidence, the pastoral leaseholders produce their title documents. The old Aboriginal people say these are no good. They say, 'Where are your songs? Where are your stories? Where are your dances? Where are your body paintings? We don't recognise these pieces of paper.' The pastoral leaseholders object. They say, 'But by our legal system, these prove that we hold leases over this land.' The Aboriginal people respond, 'Well they do not by ours. Sorry, but you have no rights to this land.'⁷

While Aboriginal law is based on an oral tradition,⁸ the Australian legal system is based on laws and rules posited in written form.⁹ This creates a difficulty for Aboriginal people seeking to prove information about their law within that system because rather than being contained in documents, their information may be recorded in stories, paintings and dance. Lisa Strelein argues that the ways of assessing truth in the Australian legal system are unable to do justice to the testimony of those who do not share the same traditions of thought.¹⁰ She notes that a significant problem facing the reception of evidence of Aboriginal people is the reluctance of members of the judiciary to view the evidence from a perspective outside their own. And the consequent 'failure to acknowledge the cultural bias of legal processes and reliance upon the myth of an objective, neutral, universal law is coupled with a conscious or unconscious stereotyping of indigenous society'.¹¹ Strelein asserts that the first step in reducing these barriers to the reception of evidence is to acknowledge that the law is a cultural institution and to introduce new laws to allow for the admission of Aboriginal people's cultural evidence.¹²

Present Situation

The courts in Western Australia have had regard to customary law in a wide variety of matters.¹³ In her background paper to this reference Victoria Williams describes the way in which evidence of customary law has been taken into account around Australia, and states that the view has been expressed that expert or credible evidence is required in order for consideration of customary law to be taken into account.¹⁴ The cases illustrate that there are variety of ways in which the court can hear information about customary law. These include by oral testimony from witnesses and through written statements given to the court. Written statements are helpful because they avoid the difficulties associated with Aboriginal witnesses giving evidence.¹⁵ In addition, they can be prepared (and perhaps agreed) prior to a hearing and therefore may obviate the need for witnesses to travel to court.¹⁶ However, it could be quite difficult from a practical point of view to prepare such a document, particularly where potential witnesses may not speak English, or are illiterate or live in remote communities without ready access to telephones or legal advisers. Thus, it is likely that in most matters when information is to be provided to the court about customary law, it will be by way of oral testimony. The problems associated with such testimony are considered below.

Problems with the Status Quo

It was noted in the consultations in Fitzroy Crossing that there is no consistent mechanism for ensuring that knowledge of Aboriginal customary law is relayed to the courts.¹⁷ The lack of appropriate means to receive evidence about Aboriginal customary law is

7. Gray P, 'Do the Walls Have Ears' [2000] *Australian Indigenous Law Reporter* 1.

8. Ibid. Gray cautions against the blanket stereotype of Aboriginal cultures as 'oral' and non-Aboriginal culture as 'literate'; however, he does conclude that it is possible to generalise that Aboriginal people think differently to non-Aboriginal people and that Aboriginal people focus on different concepts and express ideas differently to non-Aboriginal people. The ways in which these differences impact on evidence in court are discussed below in the section dealing with procedure.

9. Rowse T, *After Mabo: Interpreting Indigenous traditions* (1993) 5, cited in Gray, *ibid*.

10. Strelein L, 'The "Courts of the Conqueror": The judicial system and the assertion of Indigenous people's rights' [2000] *Australian Indigenous Law Reporter* 22.

11. Ibid.

12. Ibid.

13. Aboriginal customary law has been considered by courts in a wide range of matters: see discussion under Part III 'Common Law or Judicial Recognition', above pp 61–62. See also Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003).

14. Williams, *ibid* 9.

15. These difficulties are discussed under 'Procedure – Difficulties Faced by Aboriginal Witnesses', below pp 396–401.

16. Travelling to court was identified as a significant problem for some Aboriginal people during the Commission's consultations: LRCWA, Project No 94, *Thematic Summary of Prison Consultations*, October 2004, 5.

17. LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy Crossing*, 3 March 2004, 41. The Commission has made a proposal to encourage more appropriate and reliable information about customary law in sentencing proceedings in Part V of this Discussion Paper.

“Where are your songs? Where are your stories? Where are your dances? . . . We don't recognise these pieces of paper.”

problematic.¹⁸ Although many judicial officers have exercised their discretion to hear evidence of customary law, there are undoubtedly cases where evidence of customary law may have assisted the court and the court has not received this evidence.¹⁹ A further concern is that unreliable evidence of customary laws may be received by the court. The issue of false claims about Aboriginal customary law being made was raised in a number of the consultations.²⁰ The ALRC noted in their 1986 report that decisions based on assertions or assumptions about Aboriginal customary laws which are unproven may lead to mistaken or ill-informed decisions.²¹

At present different judges take different approaches: the reception of information about Aboriginal customary law relies largely on discretion. This creates an undesirable dependence by Aboriginal people on the discretion of the courts.²² In the consultations in Geraldton the view was expressed that the court should be required to recognise Aboriginal customary law, not simply be given discretion to do so.²³ A less obvious problem is that even where a judge is prepared to admit material as evidence where it is strictly inadmissible this may influence the assessment of its reliability. The information may be deemed relevant and admitted into evidence, but accorded little weight due to the manner in which it has been adduced. It is, of course, undesirable to dictate what use a judge may make of information about customary law; however, it is the Commission's view that it is necessary to try to overcome some of the problems encountered in proving customary law.

Problems Caused by the Common Law Rules of Evidence

Ensuring that the court is provided with reliable information about customary law in making its decisions is difficult. As stated above, in order for the court to take account of information about customary law it must be properly proved. The first test that is applied to any evidence is whether it is relevant to the proceedings. This test is not usually a problem when considering customary law. The ALRC has asserted that the main problem for evidence of customary law arises from the distinction drawn by the common law between matters of opinion and matters of fact.²⁴ This distinction is crucial to the rules of evidence: opinion evidence can only be given by a suitably qualified expert (the 'opinion rule'), and factual evidence only by someone with first-hand knowledge of the fact (the 'rule against hearsay'). Even where customary law is relevant, it may be inadmissible if it offends the opinion rule or the rule against hearsay. The ALRC observed that 'if the common law rules were to be strictly applied to the proof of oral traditions and customs (which are usually classified as matters of opinion rather than fact) then it could be that the evidence of Aborigines initiated into and familiar with their laws and traditions would be inadmissible'.²⁵ In the past a compounding difficulty has been the mistrust in the Australian legal system of the spoken word.²⁶ Each of these hurdles—the operation of the opinion rule, the rule against hearsay, and the overriding preference for written rather than oral evidence—is discussed below.

18. The courts in Western Australia have not been consistent in their requirement for proof of customary law. For example, in relation to sentencing, some judges have been prepared to accept submissions from the bar table about traditional punishment, and others have not. In *R v Gordan* [2000] WASCA 401 the sentencing judge had taken into account the fact that there was a strong possibility that the defendant would face traditional punishment, but no evidence was adduced about it. In the Court of Appeal Wheeler J stated that as there was no evidence of the nature of the traditional punishment the defendant would face she did not take it into account in determining the appropriate sentence.
19. Whether because it was prevented by the operation of the rules of evidence, because an Aboriginal witness did not feel able to express themselves in court, or because lawyers involved in the matter did not know how to prove evidence of customary law.
20. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 27 March 2003, 27; *Pilbara* 6–11 April 2003, 8; *Geraldton*, 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 23–24.
21. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [614].
22. Patrick Dodson states that 'Aboriginal people have for too long been dependant on discretions. In my Commission's view, they should not have to approach police and courts as supplicants for recognition of their customary law': see Royal Commission into Aboriginal Deaths in Custody (RCIADIC), 'Regional Report of Inquiry into Underlying Issues in Western Australia' (Vol 1, 1991) [5.11].
23. LRCWA, Project No 94 *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 14.
24. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [615].
25. *Ibid.*
26. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

Preference for Written Records Over Oral Records

A long-held view in the Western legal system is that a documentary record is more reliable than an oral record. The reason for this is that a written record is said to accurately record an event as seen at the time the record was written, and no subsequent event (or narrator) can change it. This has been contrasted with oral histories, which may be influenced or changed in successive narrations. However, recently, the High Court has indicated that it should not be assumed that written evidence about a subject is 'inherently better or more reliable than oral testimony on the same subject'.²⁷ It has been noted by anthropologist Peter Sutton that 'there should be no automatic high respect for documents or automatic skepticism about oral evidence; reliability and weight have to be established for both'.²⁸ Gray has suggested that the reasoning of courts in Australia and elsewhere in the world may be undergoing a fundamental shift on this issue, towards more ready acceptance of Aboriginal oral records.²⁹ The general preference for documentary evidence must be addressed if information about customary law is to be given due consideration by the court.

Hearsay

The rule against hearsay is one of the oldest and most complex of the common law rules of evidence.³⁰ The rule states that only evidence given by a witness appearing in court can be accepted as evidence of the truth of what is said. For example, if a witness says 'X told me that it was raining' this statement (described as an 'out of court' statement) is admissible only as evidence that it was said, not as evidence of the truth of that statement. A judge cannot rely on that statement to decide that it was, in fact, raining. There are many theories as to the reason for the existence

of the rule; the enduring reason for the maintenance of the rule is that for evidence to be reliable the person who is asserting the truth of a particular fact must be present to be cross-examined about that assertion.³¹

Aboriginal people have a culture of oral history: information about customary law is passed down the generations through storytelling. The Aboriginal view is that words can constitute truth if they can be backed by the appropriate claim to authority, such as 'this is what my father told me' or 'this is what my old people told me'.³² The authority of the statement is therefore derived from a person, in the same way that in the Australian legal system deference is shown to material derived from a text. What this means for witnesses seeking to provide proof of Aboriginal customary law is that they are required, in the process of explaining to the court about customary law, to tell the court what another person has told them. These oral records are by their very nature 'out of court' statements³³ and offend the rule against hearsay, so that even if the information is heard in court (that is, deemed relevant to the circumstances of the case) the decision-maker cannot rely on the truth of it when making their decision.

The clash between this rule and the Aboriginal way of maintaining tradition is obvious. Aboriginal society is based on the reliability of stories told to each successive generation. In *Mabo*,³⁴ Eddie Mabo gave evidence-in-chief over 10 days and his evidence as to his people's title over the subject land attracted 289 objections based on it being hearsay from counsel for Queensland alone.³⁵ The trial judge was prepared to admit the evidence on the basis that it was relevant; however he did not accept that it was admissible as evidence of the truth of what had been said.³⁶

Despite the operation of the rule against hearsay, much evidence of a strictly hearsay nature has been heard

27. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538, [63] (Gleeson, Gummow and Hayne J). See also Graham Neate, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 66.

28. Quoted in Byrne J, 'The Perpetuation of Oral Evidence in Native Title Claims' (National Native Title Tribunal Occasional Papers Series, No 3/2002, October 2002) 6.

29. Peter Gray notes that it is only relatively recently that anthropology as a discipline has begun to struggle with the criticism that it is based on the false notion of 'objective' ethnographic accounts and that biases inherent in many of the classic ethnographies have been analysed. It could be argued that the law post-*Mabo* is taking a similar path and giving consideration to the basis of previously unquestioned assumptions about the foundations of the legal system. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1, 10.

30. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [31001].

31. There is a more relaxed version of the rule against hearsay found in s 59 of the *Evidence Act 1995* (Cth).

32. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

33. *Ibid.*

34. *Mabo v Queensland* [1992] 1 Qd R 78.

35. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1, quoting Keon-Cohen BA, 'Some Problems of Proof: The admissibility of traditional evidence' in Stephenson MA & Ratnapala S (eds), *Mabo: A Judicial Revolution* (Brisbane: University of Queensland Press, 1993) 192, 200.

36. [1992] 1 Qd R 78, 87 (Moynihan J).

Aboriginal people have a culture of oral history: information about customary law is passed down the generations through storytelling.

and relied upon by courts hearing matters relating to Aboriginal customary law. In a submission made to the ALRC on the reform of the uniform Evidence Acts³⁷ a Federal Court judge suggested that the experience of judges in native title proceedings is that while initially the hearsay evidence of Aboriginal witnesses is often objected to, ruled inadmissible or limited as to use: 'after a time, the parties resisting the making of a determination that native title exists seem to cease objecting, and a vast body of first-, second- and third-hand hearsay comes to be admitted'.³⁸ The judge submitted that the effective conduct of native title proceedings is dependent on the commonsense of the lawyers who practice in this area: 'the simple fact is that a practical course must be, and is found, and in one way or another, the indigenous witnesses manage to tell their story'.³⁹

Exceptions to the rule against hearsay

Evidence about customary law is sometimes made to fit within one of the exceptions to the hearsay rule. There are a number of exceptions to the rule against hearsay at common law.⁴⁰ The *Evidence Act 1995* (Cth) also expressly provides some exceptions.⁴¹ One of the exceptions that has been relied upon to allow the court to consider hearsay evidence in cases involving aboriginal claims to land⁴² relates to statements made by deceased people about matters of general or public rights. This exception allows the court to be told what a person who is now deceased has said about rights that belong to either an entire population (known as public rights) or a class of persons (known as general rights). The reason for this exception is that a person

who is now dead (and who did not know about the court proceedings at the time of making the statement) is considered by the courts to be a trustworthy source of information about matters that are generally known – that is why evidence of this nature is sometimes referred to as 'reputation' evidence.

For example, it would be possible for a witness to give evidence that a person (now deceased) had told them that it was the custom of a particular community to use a section of a riverbank as a landing place. On the face of it such information would be deemed inadmissible by the court as it is hearsay, but because the information is about a general right and the person who made it is now deceased, the witness could tell the court what had been said about the custom of landing at that place, and the court could rely on that statement as evidence of the fact the right to land there existed. This exception will only be of limited use in allowing for information about customary law to be provided to the court⁴³ as it only relates to rights which can be characterised as general or public (which not all information about customary law could be) and must be framed as something said by a now deceased person.

Opinion

As a general proposition, a court only requires witnesses to provide evidence of facts. Any inferences to be drawn from those facts are to be drawn by the decision-maker. An inference drawn from a fact is an opinion, and witnesses are only permitted to express opinions

37. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) Appendix 3. The 'uniform Evidence Acts' means the *Evidence Act 1995* (Cth) and the Evidence Acts of New South Wales, Tasmania and Norfolk Island. When the *Evidence Act 1995* (Cth) was passed there were hopes that this would lead to uniform legislation throughout Australia, but this has not occurred. Federal courts and courts in the Australian Capital Territory apply the law found in the *Evidence Act 1995* (Cth). In addition, New South Wales, Tasmania and Norfolk Island have passed mirror legislation. These statutes are substantially the same as the Commonwealth legislation, but not identical. In New South Wales and Tasmania, state courts exercising federal or state jurisdiction and some tribunals apply the law found in the mirror legislation.

38. Ibid [17.51].

39. Ibid [17.52].

40. See Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) ch 17.

41. Section 73 allows for evidence of reputation concerning family relationships to be admitted as evidence and s 74 allows the admission of evidence of the reputation of the existence or extent of a public or general right. A more general exception is found in s 60, which allows hearsay to be adduced for a purpose other than as proof of the fact asserted.

42. In *Milirrpum v Nabalco* [1971] 17 FCR 141 Blackburn J received evidence about what deceased Aboriginal people said about their rights to land pursuant to this exception to the rule against hearsay.

43. This has been recognised by the ALRC in *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [17.20].

in limited circumstances. The common law allows opinions to be admitted into evidence only when they are expressed by an expert, such as when a doctor gives evidence about the effect of an injury. The basis of this fundamental rule is that the law recognises that so far as matters calling for special expertise are concerned, judges and jurors are not necessarily properly equipped to draw the proper inferences from facts stated by a witness.⁴⁴ Evidence from an Aboriginal person about customary law is generally held to be a matter of opinion.⁴⁵ This creates problems for the reception of evidence about customary law because of the rules about the admissibility of opinion (or expert) evidence.

The 'opinion rule' is an exclusionary rule; that is, it operates to exclude otherwise relevant evidence. The conditions for admissibility according to this rule are that:

- it is in a field of specialised knowledge;
- the witness is an expert in that field by reason of training, study or experience;
- the opinion is based on that expert knowledge;
- the facts upon which the opinion is based are identified and proved;
- the facts upon which the opinion is based are a proper basis for it; and
- the expert must explain how the field of specialised knowledge applies to the facts assumed or observed so as to produce the opinion propounded.⁴⁶

The aspects of this rule relevant to expert evidence about customary law are discussed below.

Elsewhere in this Discussion Paper a variety of different kinds of proceedings have been identified in which the court could be assisted by the provision of expert evidence about Aboriginal customary law. This information is most likely to come from two sources: Elders of a particular community who have knowledge of the relevant customary law; or through expert testimony from authorities such as anthropologists. In the consultations it was often said that it is necessary to the recognition of customary law in the Western Australian justice system that Elders become more

involved in court proceedings involving Aboriginal people. Due to the importance of the kinds of evidence that can be given by Elders (and because the sort of testimony that could be given by anthropologists fits more easily into a conventional model of evidence) the discussion in this section relates mainly to the way in which the opinion rule may limit the court's ability to hear evidence from Elders. The principal problems are that:

- the court can only receive opinion evidence from qualified experts;
- an expert cannot give evidence about the issue to be determined by the decision-maker (the 'ultimate issue' rule); and
- the expert opinion must be based on admissible evidence (the 'basis' rule).

A further complication for opinion evidence about customary law is the way in which knowledge about Aboriginal customary law is held and passed down through the generations.

Who is a qualified expert?

If it is proposed that the court hear the opinion of an expert, the question for a court in determining the admissibility of the opinion is whether there is an organised branch of knowledge in which the witness is an expert.⁴⁷ There are two aspects to this question. First, that the field must be one in which it is appropriate for an expert to be called; and second, that the witness must be an expert in that field.⁴⁸

In relation to the first requirement, the rule provides that evidence will not be admitted if the ordinary person is capable of forming a correct view on the evidence, or if the field of expertise is not based on an organised body of knowledge or experience such that it is of assistance to the court.⁴⁹ The court has recently held that anthropological evidence about the language difficulties bearing on the ability of Aboriginal witnesses to give reliable evidence is such a field.⁵⁰ If the proposed witness is an Elder, it is likely that customary law is a sufficiently recognised body of knowledge to satisfy this test. As Graham Neate, President of the Native Title Tribunal, has observed 'it would be strange to

44. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29010].

45. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [614].

46. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29045].

47. *Ibid* [29055].

48. Finding the right expert can be problematic: LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 11.

49. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29050].

50. *Jango v Northern Territory* [2004] FCA 1539.

think of senior Aboriginal men and women as ‘inexpert’ in their customary law while accepting as ‘expert’ opinion the views of non-Aboriginal observers’.⁵¹ The courts have expressed a preference for the evidence of Aboriginal people themselves in cases involving land rights. Owen J in *Ejai and Ors v The Commonwealth*⁵² stated:

[T]he best evidence lies in the hearts and minds of the people most intimately connected to Aboriginal culture, namely the Aboriginal people themselves. Expert evidence from anthropologists and others is of significance and due regard must, and will, be accorded to it. However, it seems to me that the full story lies in the hearts and minds of the people. It is from there that it must be extracted.⁵³

The requirement that the evidence be about a ‘field of study’ once meant that those who had attained expertise without formal qualifications do not qualify as experts; however, the rule has been relaxed to include qualification by experience.⁵⁴ Obviously, customary law is in the class of fields in which a witness need not derive expertise from scholastic studies, but rather from practical experience. The relaxation of this rule is perhaps not well known. In consultations in Kalgoorlie it was said that experience should be recognised as qualification as an expert.⁵⁵ Section 79 of the Commonwealth *Evidence Act 1995* (Cth) states that someone can qualify as an expert through a recognised field of study, or ‘by experience’.⁵⁶ For example, in *R v Harris*⁵⁷ the Northern Territory Supreme Court decided that an Aboriginal tracker who had learned to identify animal and human footprints from his grandparents, and had many years experience in doing so, was a suitably qualified expert.

The basis rule

The facts upon which an opinion is based must be available for scrutiny; the reason for this is that the court must be satisfied that the opinion expressed by an expert is based on admissible evidence. This is known as the ‘basis rule’. If an expert opinion is based entirely on inadmissible evidence then it is inadmissible. If the expert opinion is based on a combination of



admissible evidence and inadmissible evidence and it is impossible to determine which conclusions are based on which kind of evidence, then the expert opinion is inadmissible. Expert opinion that is based only partly on inadmissible material that can be easily ascertained is admissible, although the fact of it being based in part on inadmissible evidence will go to weight.⁵⁸

The basis rule: the interplay between hearsay and opinion

If an Aboriginal person gives evidence about customary law on the basis of their experience of that law, and the authority for that knowledge is hearsay, then the evidence may not be admissible. Further, if an expert—such as an anthropologist—seeks to provide their opinion about customary law based on what they have been told by Aboriginal people, then it is also prima facie inadmissible. The strict application of this rule would mean that opinion evidence in this area would rarely be admissible. The difficulties presented by this issue are presently overcome by concessions by counsel and flexibility in the courts.⁵⁹

The evidence of anthropologists based on hearsay was addressed by Blackburn J in *Milirrpum* who decided that there was no good reason to distinguish between the evidence of an expert in a field of study based on

51. Neate G, ‘Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia’ (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 60.

52. (Unreported, Supreme Court of Western Australia, No 1744/1993, 18 March 1994). See also *Andrews v Northern Territory* (2002) 170 FLR 138, 171.

53. *Ibid* 9.

54. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29050].

55. LRCWA, Project No 94, *Thematic Summaries of Consultations – Kalgoorlie*, 25 March 2003, 27.

56. *Evidence Act 1995* (Cth) s 79.

57. (1997) 7 NTLR 1.

58. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29065] & [31001].

59. *Ibid* [29150].

scientific observation (chemistry, for example) and anthropology, where the subject being observed is human society. His Honour said that it was natural that in the course of the study of human society some hearsay would be adverted to when providing an expert opinion in that area.⁶⁰

In practice, this rule may be avoided to some extent by the exchange of written expert evidence prior to a hearing so as to enable a party to indicate if there is any matter of which they require strict proof. However, in matters where Aboriginal customary law is relevant the restrictions of time and resources may make this exchange unrealistic. It is suggested in *Cross on Evidence* that there is much to be said for the relaxation of the rule of hearsay generally in its application to the giving of opinion evidence.⁶¹

The ultimate issue rule

The 'ultimate issue' rule states that the court cannot receive evidence about precisely the issue that it has to decide. This rule is based on the undesirability of experts becoming involved in the decision-making process. For example, it is arguable that an expert could not give evidence in a family law matter about whether a couple are traditionally married if that is what the court is required to decide. There is some dispute about whether an objection on this basis will always be upheld⁶² and the rule is relied on irregularly in practice (particularly where the evidence is necessary, and therefore arguably not restricted by the rule). In many cases the operation of the rule is a question of semantics, and can usually be overcome by expert evidence that is properly presented so that the expert does not express an opinion in the precise terms in which the court will be required to make a finding.⁶³ However, this rule does present an extra barrier to the presentation of evidence about Aboriginal customary law, particularly to witnesses whose first language is not English or who are not well-experienced in giving evidence. Section 80 of the Commonwealth *Evidence Act 1995* provides that opinion evidence is not inadmissible simply because it is about a fact in issue.

The Nature of Aboriginal Knowledge Traditions

The way that knowledge is retained by Aboriginal societies can also present a difficulty to those seeking to adduce evidence about it. Knowledge sometimes rests with a number of people: there is not one person who knows everything.⁶⁴ It may not be simply a matter of one Elder giving evidence about all of the customary law issues in a particular matter. Evidence may be required from several individuals, perhaps even a group.⁶⁵ Evidence may also be required from witnesses of both genders. The Commission's proposals are designed to provide practical measures to try to overcome some of these issues.

Can the Difficulties Caused by the Rules of Evidence be Overcome?

It is clearly not satisfactory that in order to get evidence of customary law before the court it is necessary to rely on counsel for the other side not objecting, or the evidence being forced into one of the limited exceptions to the rules of evidence discussed above.⁶⁶ Given what is known about the way that Aboriginal people retain knowledge of their customary law, the question arises, how can the regime governing evidence in Western Australia be made to operate so that the court can receive information about customary law? The ALRC asserted that the best evidence was a combination of Aboriginal testimony about customary laws, within a framework provided by expert evidence, such as anthropological opinion. These comments were made in the context of their report which encompassed an examination of land title claims.⁶⁷ As a generalisation, expert testimony from persons such as anthropologists may be more readily available (along with the resources to obtain it) in claims of that nature. The intention of this Discussion Paper is to introduce proposals that may allow evidence of Aboriginal customary law to be adduced in the broad range of circumstances in which

60. *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 161.

61. Byrne D & Heydon JD, *Cross on Evidence* (Sydney: Butterworths, 1996) [29160].

62. *Ibid* [29105].

63. In *Cross on Evidence* [29125] the comments of Giles J in *R v W Miller & Co Pty Ltd v Krupp (Aust) Pty Ltd* (1991) 34 NSWLR 129, 130–131 are said to be 'substantially accurate': 'the rule is now only applied so that an expert may not give an opinion on an ultimate issue where that involves the application of a legal standard.'

64. Gray comments that it is very difficult to choose one expert when knowledge is spread throughout a community. Gray P, 'Do the Walls Have Ears' [2000] *Australian Indigenous Law Reporter* 1.

65. See discussion under 'Group Evidence', below p 410 and accompanying proposal. In *R v Wilson* (1995) 81 A Crim R 270, 275 Kearney J of the Northern Territory Supreme Court commented that it was preferable that evidence came from a representative group, rather than from one person.

66. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [642].

67. *Ibid* [638], [642].

It is unacceptable to maintain within a fundamental structure of the legal system rules that are so clearly alien to one particular group in Australian society.

it may be relevant, in a clear and cost effective manner.⁶⁸ The Commission is of the view that it is undesirable to continue to exclude what Aboriginal people themselves say about their customary law without their evidence being confirmed by an expert from outside the community.

The ALRC's 1986 recommendation

In its 1986 report into the recognition of Aboriginal customary laws in Australia, the ALRC considered the different ways in which evidence of customary law could be received by the courts. One way, examined by the ALRC, was to exclude the operation of the rules of evidence in respect of Aboriginal customary law. However, the ALRC found that the rules provide valuable assistance to the court in determining the best evidence of a fact⁶⁹ and that

only if the existing rules, however modified to assist with proof of Aboriginal customary laws, can be shown to be wholly unsuitable for present purposes, would their wholesale exclusion be appropriate.⁷⁰

Instead, the ALRC recommended that legislation be enacted to deal with evidence of customary law with the following effect:

Evidence given by a person as to the existence or content of Aboriginal customary laws or traditions is not inadmissible merely because it is hearsay or opinion evidence, if the person giving the evidence:

- has special knowledge or experience of the customary laws of the community in relation to that matter; or
- would be likely to have such knowledge or experience if such laws existed.⁷¹

The ALRC concluded that this provision would also deal with the problems of 'experiential' evidence, as well as objections based on the 'ultimate issue' and 'basis' rules referred to above. Such a provision has never been enacted. The introduction of the uniform Evidence Acts (in New South Wales, Tasmania, Norfolk Island and the Commonwealth) dealt with some of these issues, by relaxing the hearsay rule and allowing expert testimony despite the operation of the 'ultimate issue' and 'basis' rules. It is important to note that the ALRC report pre-dated native title legislation.⁷² When it was introduced, that legislation excluded the operation of the rules of evidence; however, the act was amended in 1998 to state that the court *is* bound by the rules of evidence 'except to the extent that the court otherwise orders'.⁷³ In its *Review of the Uniform Evidence Acts* discussion paper (Discussion Paper 69) the ALRC indicates their view that s 82 is not operating efficiently and that it should be reviewed, but that such a review is outside the scope of their reference.⁷⁴ Discussion Paper 69 does, however, recommend that the *Evidence Act 1995* (Cth) be amended to provide an exception to the hearsay and opinion rules for evidence relevant to Aboriginal customary law.⁷⁵

The Evolution of the Common Law in Australia and Canada

The question arises whether Western Australia should exclude the rules of evidence as they apply to evidence of Aboriginal customary law by providing for it in the *Evidence Act 1906* (WA) or by other specific legislation. To do so would answer the criticism that it is unacceptable to maintain within a fundamental structure of the legal system rules that are so clearly

68. In practice this means not requiring that Aboriginal people seek potentially expensive expert testimony on issues that are well-known to them.

69. The report stated that the laws of evidence are intended to facilitate rather than hamper the process of trial by allowing relevant material to be placed before the court and excluding material which is likely to be unreliable or excessively prejudicial. They are also intended to make the trial process more efficient, by saving time and cost.

70. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [627].

71. Ibid [642].

72. For recent discussion about native title and evidence, see ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [17.15]–[17.23].

73. Section 82 of the *Native Title Act 1993* (Cth) states: 'Concerns of Aboriginal peoples and Torres Strait Islanders: In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.'

74. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [17.71].

75. Ibid proposal 17.1.

alien to one particular group in Australian society. Michael Black, Chief Justice of the Federal Court, has commented that despite the more flexible provisions that are found in the uniform Evidence Acts there remains:

A serious question as to whether it is appropriate for the legal system to treat evidence of this nature as prima facie inadmissible and to only admit it by way of an exception to an exclusionary rule when such evidence is in precisely the form by which law and custom are maintained under indigenous traditions.⁷⁶

Gray suggests recent decisions in Australia and overseas may herald a new approach to evidence of oral tradition,⁷⁷ and that eventually the common law may recognise a specific exception to the rule against hearsay for evidence of such traditions.⁷⁸ In Canada the Supreme Court has taken steps in that direction. *Delgamuukw v British Columbia*⁷⁹ considered the admissibility and weight to be given to the oral histories of the Gitksan and Wet'suwet'en people in a land claim. The trial judge found that oral histories could not be relied upon as evidence of the history of the peoples and accorded them no weight. The Supreme Court of Canada decided that the trial judge's approach was incorrect. They recognised the difficulty inherent in the evidence of Aboriginal peoples, Lamer CJ said:

The implication of the trial judge's reasoning is that oral histories should never be given any independent weight and are only useful as confirmatory evidence in Aboriginal rights litigation. I fear that if this reasoning were followed, the oral histories of Aboriginal peoples would be consistently and systematically undervalued by the Canadian legal system.⁸⁰

In Australia, the approach to the admissibility of oral histories has been varied.⁸¹ A progressive approach has been adopted by a number of judges, notably Lee J in the Federal Court. In *Ward v Western Australia*⁸² his Honour observed:

Of particular importance ... is the disadvantage faced by Aboriginal people as participants in a trial system

structured for, and by, a literate society when they have no written records and depend on oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work a substantial injustice.⁸³

Legislative Regimes: The Overseas Experience

In other parts of the world legislation has been enacted to relax the rules of evidence when dealing with proof of Aboriginal customary law. There is a detailed examination in the ALRC's 1986 inquiry into the recognition of Aboriginal customary law of the situation in other common law countries such as India, Commonwealth African countries and Papua New Guinea.⁸⁴ The legislative regimes in these countries are of interest because they have all grappled with reconciling the need to prove indigenous or local customs with the common law rules of evidence. It is not necessary to reproduce here the details of the legislative regimes, save to recognise that they informed the ALRC's suggested framework for the recognition of Aboriginal customary law. The outcome of the ALRC's examination of the overseas experience was their conclusion that it appears necessary to modify the common law in order to take account of evidence of customary law.⁸⁵ Indeed, ss 48 and 49 of the *Indian Evidence Act* (1872)—which allows people to give evidence about local customs who are not formally qualified experts, but who are persons who would be likely to know of the existence of a custom such as members of a tribe or family—appear to have formed the basis for the ALRC's proposed legislation to recognise Aboriginal customary laws.⁸⁶

Some of the countries discussed in the ALRC's 1986 report have legislated to allow the courts to make their own investigations about the existence of customary law.⁸⁷ A number have also enshrined a policy of judicial notice:⁸⁸ after a particular customary law has been

76. Black M, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13(1) *Public Law Review* 16, 22, referred to in ALRC, *ibid* [17.63].

77. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

78. *Ibid*. Gray speculates about this in relation to evidence of land tenure systems (and entitlements under them) in oral cultures.

79. (1997) 153 DLR (4th) 193.

80. *Ibid* 236.

81. Lisa Strelein has observed that the same criticisms could be made of Olney J's approach to the evidence in *Yorta Yorta*: see Strelein L, 'The "Courts of the Conqueror": The judicial system and the assertion of Indigenous people's rights' [2000] *Australian Indigenous Law Reporter* 22.

82. (1998) 159 ALR 483.

83. *Ibid* 504.

84. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [617]–[621].

85. *Ibid* [642].

86. *Ibid* [638].

87. *Ibid* [619] Botswana and [620]–[621] Papua New Guinea.

88. *Ibid* [618] India and [619] Nigeria.

proved in court a number of times the court is deemed to know about it in the future. The reason for this is that a fact can become part of the ordinary knowledge of the judge, in the same way that the courts can take into account the way to drive a car, without requiring expert opinion about it. The ALRC recognised the inappropriateness of these kinds of measures in Australia: investing the courts with this kind of ‘law-developing’ role risks Aboriginal people losing control over their own laws.⁸⁹ Judicial notice was said to be not applicable for a number of reasons, including the variability of Aboriginal customary law and its differing application depending on specific circumstances.⁹⁰

The ALRC’s 2005 Proposal

The ALRC now believes that the recommendation it made in 1986 to remedy the evidentiary problems associated with customary law was too narrow. In Discussion Paper 69 they suggested the following amendments to the uniform Evidence Acts:

73A Exception: Aboriginal or Torres Strait Islander customary laws

The hearsay rule does not apply to a previous representation relevant to the existence or non-existence, or the content, of the customary laws of an Aboriginal or Torres Strait Islander community.

...

79A Exception: Aboriginal or Torres Strait Islander customary laws

If a person has specialised knowledge of the existence or non-existence, or the content, of the customary laws of an Aboriginal or Torres Strait Islander community, the opinion rule does not apply to evidence of an opinion of that person relevant to those matters that is wholly or substantially based on that knowledge.⁹¹

The Commission’s View

The common law does not provide a coordinated and consistent recognition of Aboriginal customary law.

Despite the shift towards recognition of oral traditions by the common law and the efforts of a number of judges, at present the rules of evidence operating in Western Australia do not adequately provide for information about Aboriginal customary law to be received as evidence which can be relied upon by a court. The Commission does not wish to stifle the exercise of judicial discretion by proscribing the circumstances and manner in which Aboriginal customary law can be taken into account; however, it proposes legislation to assist the courts to receive information about customary law in a consistent manner.

The Commission supports the recommendation contained in Discussion Paper 69 set out above. At a federal level this suggestion would operate in conjunction with the uniform Evidence Acts, in particular s 79 of the Commonwealth *Evidence Act* which provides that experience is sufficient to qualify a witness to provide opinion evidence. As there is no express provision to that effect in the Western Australian *Evidence Act*, it is proposed that qualification by experience be expressly provided for by amendment.

Proposal 77

That the *Evidence Act 1906* (WA) be amended to provide that:

- The hearsay rule be excluded in relation to out of court statements which go to prove the existence or non-existence, or the content, of Aboriginal customary law.
- If a person has specialised knowledge, whether based on experience or otherwise, of Aboriginal customary law, then that person may give opinion evidence in relation to that matter where the opinion is wholly or substantially based on that knowledge.

89. Ibid [614].

90. Ibid [622]. The other matters referred to were the court’s incapacity directly to develop or control customary laws, the need for flexibility, and the fact that customary laws are generally not recorded in writing.

91. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) Appendix 1.

Procedure

Difficulties Faced by Aboriginal Witnesses

It is widely recognised that the court process operates unfairly for Aboriginal witnesses because the process is so far outside their cultural experience.¹ In order for Aboriginal customary law to be taken into account properly by the Western Australian legal system the system must be made more accessible for Aboriginal witnesses who are providing information to the court about customary law. The proposals contained in this section are not only designed to assist those Aboriginal witnesses giving evidence about customary law, but are relevant to all Aboriginal people who come into contact with the courts.

During the Commission's consultations for this reference much was said about the difficulties people had encountered in appearing in court, and dealing with the court system generally. The comments in the consultations focused on two broad areas: difficulty in understanding the court process; and the fact that the requirements of the court clash with the requirements of customary law.

Difficulty with the Court Process

Many Aboriginal people who give evidence in court feel alienated and confused by the experience.² These problems have been the subject of an increasing amount of judicial and academic writing, notably since the introduction of native title legislation. In addition, reports have been commissioned over the past two decades which attempt to address this problem: the ALRC

devoted five chapters to matters of evidence in their 1986 report,³ and since then a number of state bodies have considered the problems faced by Aboriginal witnesses in detail.⁴ Solutions have ranged from those directed to change at a policy level, to practical suggestions for judges and others involved in the justice system.

Problems Associated with Language

Aboriginal languages

It is not possible to make broad statements about the language use of Aboriginal people in Western Australia: it is extremely diverse.⁵ Recently, important research has been conducted into Aboriginal language use in Australia and observations made which impact on the ability of Aboriginal people to give evidence in court effectively.⁶ It is important to recognise that in some parts of Western Australia Aboriginal people are bilingual or multilingual; many Aboriginal people in remote areas do not speak English as their first or second language.⁷ There are a range of languages used; some Aboriginal people speak only Aboriginal language, some speak only English, and many speak languages that are somewhere between the two. These rule-governed varieties of non-Standard English are sufficiently different to Standard English so as to prevent the speaker of Standard English reliably understanding them. In Western Australia, Aboriginal English and Kriol are widely spoken.⁸ Of course, not only does the speaker of Standard English have trouble understanding them, but the speaker of these languages has trouble understanding Standard English: particularly the sometimes complex version of it spoken in court.⁹

1. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 12.
2. See for example, the comments made by people in Laverton about a native title hearing. LRCWA, Project No 94 *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13.
3. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) Chapters 22–26.
4. See, for example, Queensland Criminal Justice Commission (QCJC), *Aboriginal Witnesses in Queensland's Criminal Courts* (June 1996); Northern Territory Law Reform Committee (NTLRC), *Report of the Committee of Inquiry into Aboriginal Customary Law* (August 2003).
5. See 'Tindale's Tribal Boundaries' in Appendix E to this Discussion Paper. Anthropologist Norman Tindale's studies indicated that over 120 language groups or tribes existed in Western Australia in the 1950s and 1960s.
6. Note in particular the work of Dr Diana Eades and Dr Michael Cooke.
7. Figures from the 1996 census reveal that 17 per cent of Indigenous people spoke an Indigenous language at home and that this figure rose to 51 per cent in some rural areas.
8. Cooke M, *Caught in the Middle: Indigenous Interpreters and Customary Law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4. These forms of non-Standard English—including Aboriginal English (which is often spoken in urban areas), Pidgin English, Northern Territory Kriol and Learner's English—are explained in Cooke M, *Indigenous Interpreting Issues for the Courts*, AIJA, 2002, 3.
9. LRCWA, Project No 94, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 9.

Many Aboriginal people who give evidence in court feel alienated and confused by the experience.

Aboriginal English

Thus the problem is not simply one of not speaking English: the problem is compounded by the form of English spoken.¹⁰ Aboriginal English is the term used for the English spoken by Aboriginal people from both urban and rural backgrounds, it shares most of its vocabulary with Standard English, but there are crucial differences in grammar, style, pronunciation and usage that can create serious misunderstandings.¹¹ Dr Diana Eades has conducted research into the interplay between Aboriginal language and the courts¹² and contends that the failure in the justice system to appreciate the differences between standard and Aboriginal English has resulted in misunderstandings and misinterpretations of evidence. As Cooke has stated, whilst many Aboriginal people from remote regions do not speak English as their first language,¹³ 'they usually have enough to "get by"'.¹⁴ This has led to misunderstandings about their competency in Standard English, and to Aboriginal people without adequate English being required to participate in court proceedings.¹⁵ Dagmar Dixon, Coordinator of interpreter programs at Central Metropolitan TAFE, has observed that an Aboriginal person's ability to speak English should not be confused with his or her capacity to fully comprehend what is being said.¹⁶ Moreover, Aboriginal people (like non-Aboriginal people) may experience

considerable difficulty in understanding professional or bureaucratic jargon. A frequent sentiment in the consultations was 'I felt I wasn't heard'.¹⁷ The importance of this issue cannot be overstated. To speak other than the language of the dominant culture is, in itself, inherently disadvantageous;¹⁸ combine that with the unfamiliarity of the court process, and the result is a system which cannot be understood. Although the language problems for Aboriginal people seeking to give evidence have been referred to by the courts,¹⁹ not enough is being done to address the problem.²⁰

Verbal misunderstandings between Aboriginal and non-Aboriginal people can occur because of words that are shared between Aboriginal English and Standard English with different meanings:²¹ some of these differences are easier to detect than others and in some instances phrases can have quite different usages. Gray has described how the answer 'don't know' provided by an Aboriginal witness (in the context of a native title claim) could conceal a number of different propositions:

- This is not my country, so I cannot speak about it.
- Although this is my country, it is not appropriate for me to speak about it when someone more senior is present.
- Although this is my country, it is not appropriate for me to speak about it, but someone else should be approached for the information.

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10. Neate has commented that the 'courts may fare better in establishing a climate of mutual understanding and effective communication where it is clear that an Indigenous person does not comprehend or speak English than when they simply appear to': Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 17.
 11. Ibid 15.
 12. Eades' handbook for lawyers is the seminal work in this field: *Aboriginal English and the Law: Communicating with Aboriginal English speaking clients: A handbook for legal practitioners*, (Queensland Law Society, Brisbane, 1992).
 13. Figures from the 1996 census reveal that 17 per cent of Indigenous people spoke an Indigenous language at home and that this figure rose to 51 per cent in some rural areas.
 14. Cooke M, *Caught in the Middle: Indigenous Interpreters and Customary Law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4.
 15. For example, in Wiluna it was noted that 'Many people appear before the bench and they don't have a clue why they are there': LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2003, 24.
 16. Quoted in Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.5].
 17. LRCWA, Project No 94, *Thematic Summary of Prison Consultations*, October 2004, 14.
 18. Byrne J, 'Indigenous Witnesses and the Native Title Act 1993 (Cth)' (National Native Title Tribunal Occasional Papers Series No.2 of 2003) June 2003.
 19. See, for example, the comments of Lee J in *Ward v Western Australia* (1998) 159 ALR 483, 504.
 20. The Commission acknowledges that courts in Western Australia have made an effort to address these issues through measures such as the appointment of Aboriginal Liaison Officers and the publication of the *Aboriginal Benchbook for Western Australian Courts*. Nonetheless, significant problems remain. The aim of the proposals in this Part is to build on, and formalise, the progress that has been made informally by courts in this area.
 21. For example, it is now well recognised that 'to kill' in Aboriginal English does not mean to cause death; rather, it means to injure. Less well-known examples were provided to the author of the *Aboriginal Benchbook for the Western Australian Courts* by Ms Dagmar Dixon: 'cheeky' means 'hot' (as in food) and 'camp' means 'to live': see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002).

- This is not a matter which I can't speak about in front of people who are present, eg women or men or children.
- I cannot say the name because it is the name of someone recently deceased.
- I cannot say the name because it is the name of my sibling of the opposite sex.
- I don't know.²²

An additional problem is where there is no Aboriginal equivalent concept to the one being discussed in court.²³

Problems Caused by Advocacy Techniques

Language problems are compounded by the manner in which witnesses are required to provide evidence to the court. When a witness gives evidence in court they are first asked questions by the lawyer representing the party that has called them as a witness. This is called evidence-in-chief. The witness is then asked questions by the lawyer acting for the opposing party. This is called cross-examination. Different rules apply to the kinds of questions that can be asked in each kind of questioning. The reason for this is that the lawyer acting for the party that called the witness should not be able to suggest answers to their witnesses, and also that the lawyer acting for the opposing party ought to be able to test the truth of the witness's evidence, without too many restrictions being placed on the manner of their questioning. A number of different techniques that lawyers use in questioning witnesses (particularly in cross-examination) can be seen to be problematic for some Aboriginal witnesses.

Question-and-answer

The directness with which questions are asked and answers demanded in court is foreign to many Aboriginal people, whose communication style is more indirect and emphasises narrative. This method of communication is learned in childhood, and research suggests that unless the question-and-answer convention is taught from an early age it is difficult to adapt to it.²⁴ For Aboriginal people this method of communication is 'at best unfamiliar and at worst socially distressing'.²⁵ The direct, and sometimes aggressive, manner in which questions are asked and answers demanded is unknown in Aboriginal communication²⁶ and may result in Aboriginal witnesses feeling unable to provide the court with the evidence they may have to give, or giving evidence in such a way that it is not taken into account properly by the decision-maker.²⁷

Leading questions

A particular problem is caused by the kind of question that can be used in cross-examination known as a leading question. Leading questions are questions in which the lawyer puts a proposition to the witness and asks them to agree or disagree with it. They are often phrased as a statement, with a question tacked on the end as in, 'You were at the park: weren't you?' The concern with leading questions is that they can suggest an answer to the witness, and that because they only require either 'yes' or 'no' as a response, it is not apparent from the witness's answer whether they have understood the question. It has been recognised that Aboriginal witnesses have a propensity to answer leading questions in the way that they think the questioner wants them to answer. Such questions—which are often used during police interviews, as well as in cross-examination—have been identified as leading to the gratuitous concurrence²⁸ of the witness so that

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22. Gray P, 'Taking Evidence of Traditional Aboriginal Rights to Land' (Paper presented at the Supreme Court and Federal Court Judges Conference, Adelaide, January 1995) quoted in Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 23. Some of these issues, which relate to the impact of customary law on evidence, are discussed below.
 23. For example, Ms Dagmar Dixon advised the author of the *Aboriginal Benchbook for Western Australian Courts* that Aboriginal languages do not contain the concept of 'understanding' as in 'comprehension'; the nearest is that of 'knowing' (as in 'being aware of'): see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.5].
 24. Byrne J, 'Indigenous Witnesses and the *Native Title Act 1993* (Cth)' (National Native Title Tribunal Occasional Papers Series No.2 of 2003) June 2003, 5.
 25. *Ibid* 4.
 26. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.2], quotes Dr Eades who advises that thoughts and feelings may comprise the only real area of personal privacy for Aboriginal people, many of whom live in close physical proximity with one another and spend significant time maintaining family and social relationships.
 27. Fryer-Smith, *ibid* [5.3.2]. See also Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 28. He has noted that many Aboriginal witnesses react to aggressive questioning by remaining silent, providing evasive answers or responding with 'I don't know'.
 28. Gratuitous concurrence is a socio-linguistic characteristic that has been recognised as feature of police and courtroom interviews with Aboriginal people: it describes the tendency of Aboriginal interviewees to answer yes/no questions in the affirmative. See Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4. This has been recognised by the courts for some time: *R v Anunga* (1976) 11 ALR 412, 414–15.

Conventional methods of questioning witnesses can be fraught with difficulty for Aboriginal witnesses and cause unreliability not related to the veracity of their evidence.

rather than providing the court with their evidence, the witness simply agrees with the propositions put to them by counsel. Eades has described this phenomenon amongst speakers of Aboriginal English:

Aboriginal English speakers often agree to a question even if they do not understand it. That is when Aboriginal people say 'yes' in answer to a question it often does not mean 'I agree with what you are asking me.' Instead, it often means 'I think that if I say "yes" you will see that I am obliging, and socially amenable and you will think well of me, and things will work out well between us'.²⁹

This is a particular problem when the person asking the question is (or appears to be) in authority.³⁰ This passive approach to interrogation can also lead to 'verbal scaffolding' which occurs when an interviewer or examiner provides language assistance (such as by finishing an interviewee's hesitant or incomplete answers, or by prompting with suggested answers in the face of long silences) and is another way in which the insufficiency of an Aboriginal person's English is masked in interview or court situations.³¹ These issues are of great concern as they lead inevitably to the witness's true account not being provided to the court, and to the evidence of the witness not being afforded sufficient weight. In *Milirrpum* Blackburn J stated that he had

learned from other experience in this Court, not to place too much reliance on cross-examination of Aboriginal witnesses in which the questions are expressed in terms anything less than the most extreme precision.³²

Quantitative speculation

Aboriginal languages do not contain formal systems of quantification; rather, matters are specified or described in terms of geographical, climatic or social events or situations.³³ Thus it can be difficult for an Aboriginal witness to answer questions requiring a response in mathematical terms, or for them to specify 'where' or 'how many'. It is common for Aboriginal witnesses to be vague when providing quantitative estimates.³⁴

Repetitious questioning

The kind of repetitious questioning that is common in cross-examination is also alien to the Aboriginal way of communication. A common response is for the Aboriginal witness to feel that they must alter their evidence in order to provide an 'acceptable' version.³⁵ The cross-examiner is therefore able to extract inconsistencies from the witness, and the reliability of the witness's account is thereby diminished.³⁶



29. Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society, 1992) 26.

30. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.2].

31. See Cooke M, *Caught in the Middle: Indigenous Interpreters and Customary Law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 4.

32. *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 171.

33. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3.4]. At [5.1.1] an example is given of the Ngaanyatjarra language in which numerical concepts consist only of 'one', 'two', 'three' or 'a few' and 'many'.

34. This concept is also known as 'quantitative vagueness': Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 15.

35. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 27.

36. *Ibid.* Neate recites a quote from a Darwin Magistrate who says that Aboriginal people tell their stories honestly in evidence in chief, but miss out on cross-examination because they do not understand its functions.

Each of the above illustrates the ways in which conventional methods of questioning witnesses can be fraught with difficulty for Aboriginal witnesses and cause unreliability not related to the veracity of their evidence. That these phenomena have been observable over many years is illustrative of the fact that the court system has been slow to attempt to address these innate problems for Aboriginal witnesses.

Problems Caused by Demeanour

A further difficulty for the Aboriginal witness is that aspects of their demeanour are sometimes misunderstood and have been described as barriers to effective evidence.³⁷ Communication is not simply about words and language, there are other ways in which we communicate that dictate acceptable modes of social interaction and play a pivotal role in compromising effective communication.³⁸ Two significant examples of the way in which the demeanour of an Aboriginal witness may reflect a culturally different way of communicating are the use of eye contact and silence.

Eye contact

In Aboriginal society making eye contact is thought to be rude or offensive³⁹ and avoidance of eye contact is a mark of respect.⁴⁰ By contrast, eye contact in non-Aboriginal society is thought to indicate confidence, and a lack of eye contact may be interpreted as a sign of dishonesty.⁴¹ Eades recounts that in the *Pinkenba* case⁴² this cultural practice was misinterpreted by at least one of the cross-examining counsel who repeatedly insisted that one of the Aboriginal child

witnesses look at him when he was answering questions.⁴³ Thus eye contact (or lack thereof) may be misconstrued when a witness's credibility is being assessed by a decision-maker unfamiliar with this aspect of Aboriginal culture.

Silence

Similarly silence plays a different role in communication in Aboriginal and non-Aboriginal society. Silence in non-Aboriginal society tends to be negatively valued,⁴⁴ especially in response to a question asked in court, and can be construed as a failure to cooperate. In Aboriginal communication that there are at least two possible reasons for silence: that the witness is not permitted to for reasons of customary law to provide the answer;⁴⁵ or that the witness requires time to think before answering the question.⁴⁶ Silence, even long silence, is a positive, normal and accepted characteristic of Aboriginal communication.⁴⁷ The transcript of the *Pinkenba* case also provides an example of how silence can be interpreted:

Well, why did you lie to me and tell me you'd just stolen a pair of jeans from a shop? I'd suggest the reason to you, because you don't want everyone to know the little criminal that you are, do you?

That's the reason, isn't it? Isn't it? Isn't it?

Your silence probably answers it, but I'll have an answer from you. That's the reason isn't it?

Bench: ... I'm asking you to answer the question. Ask the question again please Mr ...

Isn't that right? ... Yes.⁴⁸

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37. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.3].
 38. Byrne J, 'Indigenous Witnesses and the Native Title Act 1993 (Cth)' (National Native Title Tribunal Occasional Papers Series No.2 of 2003) June 2003, 4.
 39. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 15.
 40. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.2.2].
 41. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 16.
 42. A trial which took place in the Brisbane Magistrate's Court in February 1995 in which six police officers were charged with the deprivation of liberty of three Aboriginal boys. Eades was present for the boys' evidence and makes observations about the way in which their language and communication norms affected their evidence in her article: see Eades D 'Cross-examination of Aboriginal Children: The Pinkenba case' (1995) *Aboriginal Law Bulletin* 46.
 43. *Ibid.*
 44. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [5.2.3].
 45. A suggested reason for silence is fear of what may happen in accordance with customary law if the question is answered: Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 16. See the discussion on silence and the impact of customary law on Aboriginal witnesses, below p 407.
 46. Mildren, *ibid.*
 47. Eades D, 'Cross Examination of Aboriginal Children: The Pinkenba case' (1995) *Aboriginal Law Bulletin*, 46. In his article (*Ibid.*, 17) Dean Mildren makes some practical suggestions about what a judge can do if a witness becomes silent: adjourn the matter until later in the day (effective if the witness simply needed time to think), or return to the question after a time, or ask the witness if there is someone in the room they are afraid of. He further argues that use should be made of special witness provisions such as screening, closed circuit television, having a relative or friend in the witness box, a closed court or a suitable combination of these. See Mildren, *ibid.*
 48. *Ibid.* This is also an example of gratuitous concurrence. It is noteworthy that this case, and the public and media attention it received, prompted the Queensland Criminal Justice Commission (QCJC) to undertake investigations that lead to the publication of their report *Aboriginal Witnesses in Queensland's Criminal Courts* (June 1996).

Response to stress

The communication difficulties noted above are exacerbated by stress. It has been recognised that Aboriginal cultural responses to confrontation and stress include loss of linguistic ability, avoidance of eye contact and apparent contradiction in their responses to questioning; and that these reactions are often misinterpreted by lawyers and others as lying or covering up the truth.⁴⁹ This response is not confined to Aboriginal people, there is evidence that a person's competency in a second language decreases markedly under stress.⁵⁰

These responses, along with the other aspects of an Aboriginal witness's demeanour set out above, can place the Aboriginal witness at a cultural disadvantage,⁵¹ and may be misinterpreted as a sign of dishonesty, insecurity, evasion, ignorance and or guilt.⁵²

Overcoming Difficulties of Aboriginal Witnesses in the Court Process

It is clearly in the interests of justice that witnesses appearing before the courts are given a reasonable opportunity to give their evidence in such a way that they are able to properly provide the information they have to impart.⁵³ Thus the problems identified above facing Aboriginal witnesses must be addressed and overcome, principally in the interest of fairness, but also if Aboriginal customary law is to be effectively taken into account in the Western Australia legal system.

The Need for Aboriginal Language Interpreters

The need for interpreters in courts was stressed by Aboriginal people in the Commission's consultations.⁵⁴

Language used in court doesn't make any sense to us. Aboriginal language should be used ... One of our countrymen translating is important. Aboriginal language should be brought into court.⁵⁵

If a witness does not properly understand the language used in court, then the obvious solution is to say that they must be provided with the services of an interpreter. But the equation is not that simple. For a number of reasons interpreters have been hard to find, and the courts slow to use them.⁵⁶

Reluctance to use interpreters

Historically, the linguistic characteristics identified above have led to the assumption that many Aboriginal people are able to properly understand court proceedings without the use of an interpreter. In addition to that assumption there has been unwillingness on the part of those hearing evidence from Aboriginal witnesses (and calling them as witnesses) to use the services of interpreters. This is in part due to a pervasive belief about the role that interpreters play that has led to judges, lawyers and police officers being reluctant (for varying reasons) to hear evidence through interpreters. There is a misconception that the presence of the interpreter makes the witness's evidence less, rather than more, clear. One judge has commented that:

Experience has shown that the tribunal of fact can make a better assessment of a witness if there is no interpreter transposed between it and the witness.⁵⁷

The Commonwealth Attorney General's Department has noted this reluctance and questioned the underlying basis of it:

This reflects the primary consideration...that a witness with some understanding of English should not obtain an unfair advantage ... Less attention has been given to the real risk that a witness with insufficient knowledge of English may not be able to adequately understand the questions put and convey the meaning he or she wishes to express.⁵⁸

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49. Kerr S, 'Gratuitous Justice: A Review of the Queensland Criminal Justice Commission's Report into Aboriginal Witnesses in Criminal Courts' (1996) 25 *Indigenous Law Bulletin* 1.
50. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [6.4.2], quoting Ethnic Affairs Commission, *Use of Interpreters In Domestic Violence and Sexual Assault Cases: A guide for interpreters* (Sydney, 1995).
51. Eades D, 'Cross Examination of Aboriginal Children: The Pinkenba case' (1995) *Aboriginal Law Bulletin* 46.
52. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 16.
53. *De Rose v South Australia* [2002] FCA 1342, [252].
54. See for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Fitzroy*, 3 March 2003, 3; *Laverton*, 6 March 2003, 13; *Carnarvon*, 30–31 July 2003, 5; *Wiluna*, 27 August 2003, 24; *Mirraboopa*, 18 November 2003, 14; *Albany*, 18 November 2003, 20.
55. LRCWA, Project No 94, *Thematic Summaries of Consultations – Albany*, 18 November 2003, 20.
56. Graeme Neate comments that it is a feature of native title cases that interpreters are rarely used: Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 34.
57. *R v Johnson* (1987) 25 A Crim R 433, 422 (Williams J).
58. *Access to Interpreters in the Australian Legal System* (1991) 33.3 (44), quoted in Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 12.

This misconception is compounded by the view that is held by some lawyers that the use of an interpreter is a tactical matter⁵⁹ to be employed,⁶⁰ or decried,⁶¹ depending on the circumstances. This reluctance is also found amongst the police; Cooke interviewed a police officer who, in his almost 30 years of policing experience in Indigenous contexts in Western Australia, stated that he had never had the opportunity to call for the services of an interpreter.⁶² It appears that there is an identifiable bias against the use of interpreters in criminal trials; this can be contrasted with the position in native title matters, according to the representative of the Kimberley Interpreting Service (KIS).⁶³ The Queensland Criminal Justice Commission (QCJC) contends that this attitude is based on the curious proposition that 'even badly spoken and understood English makes for more effective communication than proper and competent interpretation from one language to another'.⁶⁴

Scarcity of interpreters

A further aspect of this problem is that even if a decision is made to use an interpreter, for a number of reasons there may be no interpreters to use.⁶⁵ The *Aboriginal Benchbook for Western Australian Courts* notes the lack of trained interpreters and the fact that very few Aboriginal interpreters have attained the minimum National Accreditation Authority for Translators and Interpreters (NAATI) standard for interpreting in court proceedings.⁶⁶ The Translating and Interpreting Service (TIS) which provides a free interpreting service to those appearing before the courts in Western Australia does not have Aboriginal language interpreters. The practice of using untrained—and unpaid—interpreters was seen to be problem in the consultations.⁶⁷

It is clear that the problems with Aboriginal language use will continue until significant steps are taken to provide Aboriginal people adequate language assistance in court. The first priority must be to train more interpreters.

Proposal 78

That adequate funding be provided for the training of Aboriginal interpreters.

That consideration be given to an accreditation system for Aboriginal language interpreters, in particular to a structure that enables more Aboriginal people to attain the requisite accreditation.

Right to an interpreter

There is no statutory right to an interpreter in Western Australia.⁶⁸ At common law an accused person who does not understand the language of the court is entitled to an interpreter;⁶⁹ however, witnesses may only give evidence through an interpreter with the leave of the court.⁷⁰ Article 14(3) of the *International Covenant on Civil and Political Rights* guarantees the right to have 'the free assistance of an interpreter if [an accused] cannot understand or speak the language used in court'.⁷¹ Thus it is the Commission's view that the right for a witness to give evidence through an interpreter should be provided in legislation.

Proposal 79

That the *Evidence Act 1906* (WA) provide that a person has the right to give evidence through an interpreter, unless it can be established that they are sufficiently able to understand and speak English.

59. Ibid 13.

60. The lawyer interviewed by Dr Cooke in his investigations commented that: 'I never use an interpreter unless its really serious and using an interpreter is to my advantage in getting an acquittal'. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 48.

61. See, for example, the comments of one lawyer '... in my submission he should be required to answer the final question ... by himself, unaided with the support of an interpreter to try and dream up some explanation for it ...' contained in an excerpt of transcript from a coronial inquiry reproduced in Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 21.

62. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 49.

63. Ibid 50.

64. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) 63, quoting Law Reform Commission of Canada, *Interpreters Report* (1991) 46–47.

65. See comments by Broome-based magistrate in Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 45.

66. This level requires the undertaking of a three-year university degree: Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [6.4.2]. In Western Australia TAFE provides a one-year Diploma of Interpreting Aboriginal Languages course, which gives graduates a 'paraprofessional' accreditation.

67. LRCWA, Project No 94, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 9.

68. There is a statutory right to an interpreter in South Australia pursuant to s 14 *Evidence Act 1929* (SA). There is also a statutory right to an interpreter when appearing before the Immigration Review Tribunal and the Refugee Review Tribunal. The Canadian Charter of Rights guarantees, by s 14, an interpreter to any person who does not understand the language of the proceedings.

69. *Lee Kun* [1916] 1KB 337.

70. *Dairy Farmer's Co-operative Milk Co Ltd v Aquilina* (1963) 109 CLR 458, 464.

71. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 18.

That a defendant in criminal proceedings who cannot sufficiently understand English shall be entitled to the services of an interpreter throughout the proceedings, whether or not they elect to give evidence.

That where the court has any reason to doubt the proficiency of a witness to either understand or speak English then the proceedings should not continue until an interpreter is provided.

That funding be made available to cover the cost of interpreters where required for witnesses and defendants in criminal proceedings.

How should the need for an interpreter be assessed?

The burden of assessing the need for an interpreter should not rest solely with judges. Gray contends that judges usually 'lack the ability to assess language skills'.⁷² In the Northern Territory there are three ways that the need for an interpreter can be confirmed: by self-assessment (with the assistance of a recorded advice in Aboriginal language); after an assessment by a lawyer (with the assistance of a specially designed test); and after assessment by an expert (using a standardised measure of proficiency).⁷³ It is recommended that a suitably qualified linguist be requested to formulate similar aids for use in Western Australia.

Proposal 80

That a qualified linguist be engaged by the Department of Justice to formulate tests to assist courts to determine when a particular witness or defendant requires the services of an interpreter.

Inherent difficulties in interpreting for Aboriginal witnesses

There are some inherent difficulties with the use of interpreters for Aboriginal witnesses. The principal concern is whether they should be required to translate literally (that is, word-for-word) or whether it is permissible that concepts be explained. Mildren contends that there needs to be a greater understanding by both judges and lawyers that

interpreters 'are not mere translators, and somehow the interpreter must convey not only the words spoken but the meaning intended.'⁷⁴ As noted above, it is often not possible to simply find equivalent words in English and Aboriginal languages.⁷⁵ Properly trained interpreters are therefore crucial in dealing with this problem, in order to combat the suspicion of counsel when a question or answer takes longer to interpret than they think it should. In a paper published by the AIJA Cooke quotes transcript from a coronial inquiry in which this suspicion was evident:

Counsel: Why are you now saying that they came from your left?

(Witness turns to speak through an interpreter)

Counsel: You don't need to ask Mr Cooke with you there. Why are you now saying...

Interpreter: He's not asking.

Witness: Well I didn't know – I didn't know...

Counsel: Your worship, in cross examination, particularly on a point where a witness has been demonstrably contradictory and unreliable, as he has here, particularly when he's been answering all the questions up to that stage by himself, in my submission he should be required to answer the final question ... by himself, unaided with support of an interpreter to try and dream up some explanation for it ...

Coroner: It's utterly impertinent to suggest that the interpreter is going to help him dream up some explanation.

Counsel: ...well, I'll withdraw that your Worship...⁷⁶

The Commission has made a proposal in Part V that the government provide adequate resources for cultural awareness training for lawyers (see Proposal 7). Bearing in mind the problems identified in this section, the Commission suggests that these programs should specifically include training for lawyers to assist them in working with interpreters. The Commission is of the view that the Law Society of Western Australia would be the most appropriate organisation to provide cultural awareness programs for lawyers. In addition, the Commission suggests that it would be extremely useful if the Law Society of Western Australia engaged a suitably qualified linguist to prepare a publication for Western Australia similar

72. Gray P, 'Do the Walls Have Ears?' [2000] *Australian Indigenous Law Reporter* 1.

73. Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 34.

74. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 18.

75. Ibid. This may be due to language or cultural differences.

76. Cooke M, *Indigenous Interpreting Issues for the Courts* (Australian Institute of Judicial Administration, 2002) 21.

to that prepared for the Queensland Law Society by Diana Eades.⁷⁷

Challenges Facing Aboriginal Language Interpreters

For his Background Paper to this reference Cooke conducted a field-based investigation into the work of Aboriginal language interpreters based on interviews with a range of people who have experience or knowledge of the challenges facing Aboriginal language interpreters.⁷⁸ He observed that customary law impacts upon the work and welfare of the interpreter.⁷⁹ The conclusions expressed in his paper are grouped into two sections: 'Misunderstandings about the Legal Interpreter's Role' and 'Implications of Customary Law on the Code of Ethics for Interpreters'.⁸⁰

Misunderstandings about the interpreter's role

The fact that Aboriginal interpreters are so little used has meant that the role of the interpreter is not well understood amongst Aboriginal communities; as a result it may be assumed that the interpreter is 'taking sides'.⁸¹ Cooke was told that on occasion interpreters have been blamed for the outcome of proceedings. The concern expressed in the consultations about interpreters being unpaid no doubt contributes to this problem. These issues are concerning on two levels; first, they are indicative of a misunderstanding by the community about the operation of the court system, and second, they serve to dissuade others from becoming interpreters. Cooke has made suggestions designed to overcome the misunderstandings he identified by taking steps to explain the role of the interpreter to Aboriginal communities.⁸² The Commission endorses those recommendations.

Proposal 81

That the Department of Justice, in conjunction with Aboriginal communities, provide education about the role of interpreters through:

- community education broadcasts; and
- the development of information videos to be distributed in communities and accessible at police stations, prisons and courts.⁸³

Problems faced by interpreters as a result of customary law

Cooke also considered the ways in which customary law can impact on the role of the interpreter.⁸⁴ He discusses the impact on three areas:

- **Impartiality:** an Aboriginal interpreter will often know or be related to the witness, which can create a conflict of interest for the interpreter.⁸⁵
- **Confidentiality:** an Aboriginal interpreter may feel considerable pressure to divulge knowledge gained in the course of their interpreting work.⁸⁶
- **Accuracy:** language restrictions imposed by customary law mean that the interpreter must tailor their speaking style according to whom they are addressing and also to whom they are referring.⁸⁷

Consideration must therefore be given to the ways in which the courts and the Department of Justice can assist Aboriginal interpreters who face difficulty in their role as interpreter for reasons associated with customary law. In his Background Paper, Cooke made specific recommendations which are directed to those problems. The key change needed is for both courts and interpreters to be aware of, and able to

77. Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society, 1992).

78. These people included experienced Indigenous interpreters, non-Indigenous interpreters of Indigenous languages for the purpose of contrast, trainers of Indigenous interpreters and lawyers, police, and a Magistrate with extensive dealings with Aboriginal people of a non-English speaking background.

79. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 1.

80. *Ibid* 2.

81. Cooke was advised of a situation where an Aboriginal Court officer who had performed the function of an interpreter for an accused person in a police interview had been assumed by the Community to be 'aligning' himself with the accused and had been ostracised. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 47.

82. The Law Society of Western Australia has also endorsed the recommendations made by Dr Cooke: see Submission from the Law Society Western Australia in relation to Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004).

83. It is noted that the Kimberley Interpreting Service has applied for a grant from the Public Purposes Trust to make two videos to impart that information – one for lawyers, the courts and police, and one for Aboriginal communities. See Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004) 43.

84. *Ibid* 56.

85. *Ibid*.

86. *Ibid* 57.

87. *Ibid* 58.

deal with, the problems that arise. Properly trained interpreters are essential to this process. Not only can they identify the problems, but they can also communicate with the court about the best way to solve them. In addition, some practical steps can be taken to avoid conflicts of interest.

Proposal 82

That guidelines be developed for the use by the Department of Justice in dealing with interpreters of Aboriginal languages, including:

- Using only trained interpreters.
- Establishing a pool of male and female interpreters from different family or skin groups and different communities.
- Providing information (such as the name of the parties and witnesses in a case and a brief outline of the subject matter) to the interpreter prior to the hearing to enable them to assess if there is a conflict under customary law.

It is clear that the role of the interpreter is not well understood, and that there are some practical problems with the way that Aboriginal interpreters have been used in court. With this in mind the Commission invites submissions to inform the development of protocols to provide practical assistance to courts, witnesses, parties, lawyers and interpreters.⁸⁸

Invitation to Submit 17

The Commission invites submissions to inform the development of protocols to assist witnesses, lawyers, parties and court officers when using the services of an interpreter.

Evidence Given in 'Narrative Form'

Another possible development is to depart altogether from the traditional question-and-answer form of examining a witness. An alternative way for a witness to provide information to the court is by way of a narrative;⁸⁹ that is, by telling their story uninterrupted, not by responding to questions. Research cited by the ALRC shows that allowing a witness to give a free account of events as a narrative may give a significantly more accurate version and that answering questions may distort and limit testimony.⁹⁰ The concern with this form of evidence is that inadmissible material may be included by the witness in their narrative; however, Neate has commented that this is a 'price worth paying if it is the only means to allow the truth to be told'.⁹¹ ALRC Discussion Paper 69 sets out the view of those who provided submissions on this point, with most detractors concerned about the admission of extraneous or inadmissible material and the effect that such material may have on the decision-maker (particularly a jury).⁹² Neate suggests that one way of overcoming this problem—and assisting the witness to give a coherent account—is to have the narrative evidence prepared in written form and have the witness read the statement at the hearing. This approach has been adopted in New Zealand.⁹³ This is, of course, not a startling proposition: almost all evidence in commercial litigation is prepared in exactly this fashion.⁹⁴ From a practical point of view, it remains likely the majority of Aboriginal witnesses giving evidence in court will not be appearing in matters which have sufficient allocation of time and resources to allow for the preparation of such documents. The question therefore is whether legislative reform is necessary to provide evidence to be given in this manner.

The uniform Evidence Acts provide by section 29(2) that a witness can give evidence in narrative form with the leave of the court. This section reflects the common

88. Such protocols might include the suggestions made by Cooke (which are endorsed by the Law Society) designed to overcome the misunderstanding about the role of the interpreter: see Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2 (March 2004).

89. Suggested in Eades D, *Aboriginal English and the Law* (Brisbane: Queensland Law Society, 1992) 83.

90. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31(1986) [607]–[609]; ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.7].

91. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 30.

92. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.13]–[5.23].

93. Neate G, 'Land Law and Language: Some Issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 30.

94. This is acknowledged by Neate, *ibid*, who quotes Heerey: 'beneath the seamless, persuasive flow of narrative, helpfully signposted by sub-headings, there lie the hidden (and expensive) labours of solicitors and counsel'. See Heerey P, 'Storytelling, Postmodernism and the Law' (Paper presented at the Supreme Court and Federal Court Judge's conference, Canberra, January 2000) 16.

law position.⁹⁵ The QCJC recommended that provision be made in their Evidence Act for evidence to be given in narrative form, without the requirement that leave be granted;⁹⁶ however, this has never been enacted.

In the consultations a preference was expressed for evidence given in this manner.⁹⁷ The Commission is of the preliminary view that the common law position adequately provides for the giving of evidence in narrative form and that no legislative amendments are necessary, however the Commission is unaware of the extent to which courts allow Aboriginal witnesses to present their evidence in narrative form and therefore seeks submissions from interested parties (in particular, judges, lawyers and witness groups) on this point.

Invitation to Submit 18

The Commission invites submissions as to whether it is necessary for amendments to be made to the *Evidence Act 1906* (WA) to allow for evidence to be given in narrative form, and to provide for regulation of that form of evidence.

Limitations on Questions

A further way in which the negative effects of traditional methods of asking questions of Aboriginal witnesses may be removed is by the exercise of the court's discretion to limit cross-examination. This is one of the proposals put forward by Mildren in the article referred to earlier.⁹⁸ He states that there is no right to cross-examine (contrary to what may be thought) and that more use should be made of the trial judge's right to prevent questions being put unfairly to Aboriginal witnesses. This would also have the effect of guarding against their evidence being afforded little weight.⁹⁹ He goes further and asserts that the cross-examiner of an Aboriginal witness should not be permitted to

put leading questions to such a witness except by the leave of the trial judge.¹⁰⁰

The limitation of leading questions, and its effect on the fairness of a criminal trial, was recently discussed by the Court of Appeal in Western Australia in *Stack v The State of Western Australia*.¹⁰¹ In *Stack* the trial judge ruled that defence counsel could not use leading questions in his cross-examination of one of the principal prosecution witnesses in a murder trial.¹⁰² The Court of Appeal confirmed that the trial judge had the power to limit cross-examination, but urged great caution in the exercise of this power.¹⁰³ There must be a sufficient basis, reflecting on the fairness of the trial, to justify the step being taken.¹⁰⁴ The Commission is of the view that the circumstances of this matter are illustrative of the tension between the problems for Aboriginal witnesses that have been identified above the competing interest of allowing parties to properly test evidence in an adversarial system. In *Stack* the trial judge formed the view that the witness in question was placed at a disadvantage by the manner of questioning; counsel for the accused was likewise disadvantaged by the ruling which prevented him from freely questioning an important prosecution witness where his client faced life imprisonment.

In the report of the QCJC it was stated that the cultural awareness training that they proposed would assist this issue by promoting understanding amongst lawyers and judges about the kinds of problems faced by Aboriginal witnesses. However, they stated that there should be legislation affirming this position and that in determining whether cross-examination should be limited the court should have regard to (among other things) the extent to which the witness's cultural background or use of language may affect their answers.¹⁰⁵

The Commission is of the view that at present judges in Western Australia have sufficient power under the

95. In *R v Butera* (1987) 164 CLR 180, referring to evidence given by charts or explanatory materials, the High Court stated that in waiving the general rules regarding the giving of evidence, the court must consider whether there is a risk that an altered form of giving evidence might give it undue weight.

96. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 4.1. In their report the QCJC comments where a witness gives evidence in narrative form the operation of the rules of evidence, the skill of counsel and the court's discretionary power to control proceedings should be sufficient to control the introduction of inadmissible material: 50.

97. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13.

98. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7.

99. Note the comments of Blackburn J in *Milirrpum v Nabalco Pty Ltd* (1971) FLR 141, 179 that his Honour does not place weight on the cross-examination of Aboriginal witnesses.

100. Mildren D, 'Redressing the Imbalance Against Aboriginals in the Criminal Justice System' (1997) 21(1) *Criminal Law Journal* 7, 16.

101. [2004] WASCA 300.

102. *Ibid.* The appellant in this matter was convicted after trial of manslaughter and appealed against his conviction.

103. *Ibid* 117.

104. *Ibid* 124.

105. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 4.2.



common law (as is demonstrated by *Stack*) to control proceedings in an appropriate way. Further, the Commission believes that its proposal for cultural awareness training at the end of this Part will be directed to raising awareness among judges about the ways that they can exercise their discretion to ensure that a witness is treated fairly in all circumstances.

The Impact of Customary Law on Aboriginal Witnesses

It was reported during the consultations that for some witnesses their obligations under Aboriginal customary law have clashed with the requirements of the court.¹⁰⁶ For example, Aboriginal customary law can affect a witness's ability to give evidence where:

- a witness does not have authority to speak on the subject they are being asked about: either because

they are not entitled to the knowledge, or because they cannot speak about it in the circumstances of the hearing;

- there is a speech ban or taboo in place;
- information which may be relevant to the proceedings is secret, or cannot be publicly disseminated; or
- knowledge of information which may be relevant to the proceedings is restricted to one gender only.

This list is not exhaustive: the kinds of restrictions that can impact upon a witness's evidence are as diverse as customary law itself. Nonetheless, it is important to recognise the types of issues that can arise in order to determine the best way of dealing with them. The examples above, along with some suggested solutions to the difficulties they present for courts attempting to receive evidence about Aboriginal customary law, are examined below.

Authority to speak

Not every person in an Aboriginal community is able or willing to speak about aspects of their culture. As discussed above, the Aboriginal knowledge tradition differs greatly from the non-Aboriginal system, and knowledge is 'rarely freely open or freely available'.¹⁰⁷ Some matters may only be spoken of in certain places: this has been identified as being of particular importance in native title matters, and is one of the reasons that the Federal Court has gone out to Aboriginal communities to hear evidence 'on country'.¹⁰⁸

Speech bans and taboos

It is well documented that at certain times, and after certain events, many Aboriginal communities impose speech bans that may relate to particular words.¹⁰⁹ In many Aboriginal communities it is offensive or inappropriate to refer to the name of a deceased person, especially a recently deceased person.¹¹⁰ This may constitute a violation of customary law.¹¹¹ In criminal

106. LRCWA, Project No 94 *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13; *Pilbara*, 6–11 April 2003, 12.

107. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 18.

108. Byrne J, 'The Perpetuation of Oral Evidence in Native Title Claims' (National Native Title Tribunal Occasional Papers Series, No 3/2002, October 2002) 6.

109. A well-known example is that after a person has died their name must not be spoken. For further discussion of these taboos, see Part VI 'Funerary Practices – Aboriginal Funerary Rites', above pp 310–11.

110. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA Project No 94, Background Paper No 15 (June 2005) 40. Philip Vincent also states that other matters such as the publication of details about a person who is going through the law may be prohibited by customary law. See also Neate G, 'Land, Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the Conference of the International Association of Forensic Linguists, Sydney, 2003) 52.

111. NTLRC, 'Aboriginal Communities and Aboriginal Law in the Northern Territory', Background Paper No 1, *Report of the Committee of Inquiry into Aboriginal Customary Law* (2003) 30.

proceedings, particularly in cases of homicide where the deceased is Aboriginal, it may be difficult not to name the deceased. This may occur during oral evidence or the name may be referred to for procedural purposes such as reading the charge to the accused. There can be numerous constraints on the use of language by an Aboriginal witness—such as age, kinship, and ceremonial considerations—and these constraints may be carried over to the courtroom.¹¹² Counsel have exhibited varying degrees of understanding of such matters. In *Cubillo & Gunner v The Commonwealth*¹¹³ the following exchanges took place:

Counsel for the Applicants:

... where was Lorna Cubillo born?

Interpreter:

She is asking how she is going to talk because where she is born is avoidance for Kathleen to say that place name.¹¹⁴

...

Counsel for the Commonwealth:

Who did you marry there?

Counsel for the Applicants:

Your Honour, this is one of the matters that was raised yesterday and there's difficulty about asking the...witness to speak the name of her deceased husband. But if that difficulty can be overcome, and there are means to do so...

Counsel for the Commonwealth:

But, really, your Honour, I can understand her being sensitive to a number of matters, but it can't be allowed to intrude on the process of being able to get evidence out. It's a very straightforward matter as to who someone married, even if that person may have later died. It places an intolerable burden if, every time I ask her about a name, it turns out that person may have died ...¹¹⁵

Secret knowledge

Other matters of Aboriginal knowledge should not be spoken about at all, or only among certain people. It

was reported in the consultations at Laverton that at a recent native title hearing, evidence of customary law had been broadcast outside the courtroom, causing great distress to the community.¹¹⁶ Secrecy can take precedence over other important matters: in Broome it was said that 'a wrong was committed in the name of traditional law, where the claim was false, but the matter was shrouded by a code of silence'.¹¹⁷

Avoidance relationships

Concern was also expressed in the consultations about a lack of respect in the legal system for 'avoidance relationships': which mean that certain family members should not be in court together, or that some witnesses will not be able to talk of some matters in front of certain other members of the community.¹¹⁸ In Wiluna it was noted that sometimes the court breaks Aboriginal law because people are required to speak in front of those they are not supposed to; the example was given that a mother-in-law to a defendant or witness might be in court, preventing them from speaking in front of her.¹¹⁹ In another example, two Warburton Elders were in the same court and they could not talk to each other directly, but only by making particular noises 'from their throats'. The Magistrate said 'stop making those noises'. It was said 'he should have respected those men, instead he shamed them'.¹²⁰

Gender restricted information

There are strict delineations in Aboriginal culture about knowledge that is appropriate for men, and knowledge that is appropriate for women.¹²¹ A female witness will not be able to speak about certain topics in front of men, and vice versa.¹²² In relation to native title it has been said that the gender restricted nature of aspects of Aboriginal knowledge has resulted in discrimination against Aboriginal women who have not been able to provide their evidence in land claims because of the male-dominated nature of the legal system.¹²³

112. Cooke M, *Caught in the Middle: Indigenous interpreters and customary law*, LRCWA, Project No 94, Background Paper No 2, (March 2004) 10–15.

113. [1999] FCA 518.

114. Transcript of hearing (26 August 1999) 1858, as cited in Flynn M & Stanton S, 'Trial by Ordeal: The stolen generation in court' (2000) 25(2) *Alternative Law Journal* 75, 77.

115. Ibid 1869.

116. LRCWA, Project No 94, *Thematic Summaries of Consultations – Laverton*, 6 March 2003, 13.

117. LRCWA, Project No 94, *Thematic Summaries of Consultations – Broome*, 17–19 August 2003, 24.

118. LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 August 2003, 13: 'people coming into court with avoidance relationships are forced to sit or stand with each other'

119. LRCWA, Project No 94 *Thematic Summaries of Consultations – Wiluna*, 27 August 2004, 24.

120. Ibid.

121. Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.

122. LRCWA, Project No 94, *Thematic Summaries of Consultations – Wiluna*, 27 August 2004, 24.

123. Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.

There are strict delineations in Aboriginal culture about knowledge that is appropriate for men, and knowledge that is appropriate for women.



Finding Procedural Solutions to the Problems Caused by the Impact of Customary Law on Aboriginal Witnesses

A difficult decision

An Aboriginal witness who finds that their obligations in court come into conflict with their obligations under Aboriginal customary law has two choices: to not give their evidence, the effect of which may be that the court fails to hear material that is potentially crucial to the matter being tried;¹²⁴ or to comply with the obligations placed on them by the Australian legal system, and thereby break customary law and perhaps face punishment. However, there is an important middle

ground; that is, that a witness may give evidence but feel obliged to self-censure. The result then is that all the relevant evidence is perhaps not provided to the Court, but the Court is not aware of it. The seriousness with which Aboriginal people regard breaches of their customary law should not be underestimated. In Wuggubun the Commission was advised that 'Much law is secret. I could be killed for telling you how it runs.'¹²⁵ It has also been noted that 'each and every breach of Aboriginal customary law is a serious matter; it is not, as some non-Aboriginal people seem to assume, that further breaches are less serious than [an] initial one'.¹²⁶

Private versus public interests

The question for the Commission is whether any reform to court procedure or methods of giving evidence can be implemented that will assist Aboriginal witnesses to give necessary evidence by removing the conflict with customary law. This question has been seen to be essentially one of weighing up the private interests of the individual witness, against the public interests that govern procedural fairness. Looking at the examples above it seems that it is possible to either:

1. empower Aboriginal witnesses to give evidence, either by allowing them to remain silent about certain matters (such as banned words) in the course of their evidence or making changes to the courtroom to make them feel more comfortable; or
2. allow Aboriginal witnesses to give evidence in circumstances where only certain people could have access to that evidence, for reasons of secrecy or gender restriction.

Each of the above measures carries quite different weight when balancing the interests of justice. The former is unremarkable, and analogous to the kinds of

124. Keely, *ibid*, has set out this choice in relation to Aboriginal women and gender restricted evidence, but it applies equally to any person faced with a possible breach of customary law.

125. In this context the word 'killed' might be interpreted as 'subject to customary law punishment'. LRCWA, *Thematic Summaries of Consultations – Wuggubun*, 9–10 September 2003, 34.

126. Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.

measures that are currently in place to assist vulnerable witnesses. The second goes against the fundamental principle of transparency upon which the administration of justice is based.¹²⁷ Nonetheless, it highlights the very significant implications of an increased recognition of Aboriginal customary law, and the importance of reforms which facilitate that recognition. Reforming court procedure to allow for this recognition is a difficult exercise; the proposals set out below concern fundamental principles to both the Australian legal system and Aboriginal customary law. It is the Commission's view that the recognition of Aboriginal customary law is of such importance in some situations that consideration must be given to recognising the competing interests, not as balancing public and private interests, but giving weight to the recognition of Aboriginal customary law as a valid public interest.

Privilege against self-incrimination under customary law

One way in which the law could be changed to address the impact of Aboriginal customary law on witnesses when giving evidence to a court, is to extend a category of privilege to witnesses in that situation. This means that the witness would not be required to answer a question if to do so would breach customary law. The question whether there should be such category of privilege was considered by the ALRC in their 1986 report, and the conclusion was reached that an absolute category of privilege should not be recognised in this area.¹²⁸ The ALRC is presently reconsidering whether a privilege against self-incrimination under Aboriginal customary law should be recognised as part of their reference reviewing the uniform Evidence Acts. Discussion Paper 69 asks the question whether the uniform Evidence Acts should be amended to allow the courts to excuse a witness from answering a question that tends to incriminate the witness under customary law, and if so what should be the applicable criteria.¹²⁹ The Commission understands that the ALRC's final report on this topic will be published shortly and considers it inappropriate to formulate a proposal on that issue prior to the release of that report.

Rather than look to extending categories of privilege, the Commission instead proposes practical procedural solutions to give the courts flexibility when dealing with Aboriginal witnesses who are reluctant to give evidence because of the considerations of customary law. These measures are set out below.

Vulnerable witness provisions

For reasons of customary law it may not be possible for an Aboriginal witness to give evidence because of the presence of a particular person in court. The provisions of the *Evidence Act 1906* (WA) contain a range of measures which are intended to assist vulnerable witnesses¹³⁰ and a set of guidelines are in place to facilitate their operation.¹³¹ A witness is able to give evidence with a support person, in a remote room or by special video-taped hearing if they are declared to be a 'special witnesses', defined as someone who:

In the court's view is likely to suffer emotional trauma from giving evidence in the normal manner, or to be so intimidated or stressed as to be unable to give effective evidence...¹³²

It is suggested that a provision analogous to this one be introduced to make it clear that where for reasons of customary law a witness is not able to give evidence in the ordinary way they may apply to use one of the measures described.

Proposal 83

That the *Evidence Act 1906* (WA) be amended to include a provision that if for reasons of customary law a witness is not able to give evidence in the normal manner then the witness may be declared a special witness and be able to give evidence using the protective measures set out in ss 106A to 106T on the application of the witness, or on the initiative of the court.

Group evidence

Another way to assist Aboriginal witnesses to feel able to give evidence is to enable them to do so in groups.

127. *Re an Application for a Writ of Certiorari against ROBINS, Stipendiary Magistrate in the Court of Petty Sessions, Perth; ex parte Western Australian Newspapers Ltd* [1999] WASCA 16, [5] & [10] (Ipp J; Pidgeon J and Steytler J concurring).

128. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [614]. The ALRC recommended that courts be given power to hear the evidence of two or more members of an Aboriginal community.

129. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) Question 17.2.

130. *Evidence Act 1906* (WA) ss 106A–106T.

131. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.4.4].

132. *Evidence Act 1906* (WA) s 106R.

In native title cases the Federal Court has heard evidence from groups of witnesses.¹³³ This method of hearing evidence recognises the way in which knowledge is shared in Aboriginal culture.¹³⁴ Black CJ has said that it is done 'in recognition of the fact that within many Aboriginal communities not every person is able or willing to speak about their country, and to do so without authority from others may be very wrong'.¹³⁵ It is suggested that if evidence about Aboriginal customary law is to be heard in matters in Western Australia then consideration must be given to allowing witnesses to give evidence in groups. Order 78 rule 34 of the *Federal Court Rules* provides that group evidence may be admitted in native title matters. It is suggested that the *Evidence Act 1906* (WA) be amended to include a similar provision.

Proposal 84

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be given by witnesses in groups.

Evidence taken 'on country'

If a witness is reluctant to give evidence because of factors related to the courtroom environment itself, then an option is to have the court take the evidence where the witness is most comfortable. Another method employed in native title hearings is for the court to travel to Aboriginal communities to hear evidence 'on country'.¹³⁶ This has obvious benefits in land claims, but may also be useful, and indeed respectful, in other matters in which evidence of customary law must be heard. Not every kind of matter would be appropriately held 'on country';¹³⁷ however,

it is suggested that the *Evidence Act 1906* (WA) could be amended to allow for it to occur on the application of a party. The legislation should be flexible, and allow for only some evidence to be heard in that manner, so that a hearing may be heard in part in court, and in part on country.

Proposal 85

That the *Evidence Act 1906* (WA) be amended to provide that the court in the exercise of its discretion can allow evidence about customary law to be taken on country.

Single gender courts

The issue of gender restricted evidence is not a simple one. In order to accommodate the restrictions of customary law, evidence of a gender restricted nature¹³⁸ may be required to be heard before a female Judge (with a female Associate and other court staff) before a female jury¹³⁹ (where applicable), with the matter argued by female lawyers, and with the assistance of all female experts such as interpreters or anthropologists. Not long ago, many court hearings would have featured men in all of these positions. It has been asserted that the Australian legal system must attempt to accommodate Aboriginal witnesses in this regard:

It is not the women who should be forced to compromise, but rather the hearing should be structured in such a way that women feel comfortable to discuss a wide range of matters and to demonstrate their competence and knowledge.¹⁴⁰

In *Ward v Western Australia*,¹⁴¹ a native title matter involving evidence of a restricted nature, Lee J made orders that placed restrictions on the taking, recording and dissemination of evidence to a particular gender.¹⁴²

133. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 31
134. ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [645] & [648].
135. Ibid, quoting The Hon M Black AC, Chief Justice of the Federal Court of Australia, 'Developments in Practice and Procedure In Native Title Cases' (2002) 13 *Public Law Review* 16, 22.
136. Discussed in Byrne J, *The Perpetuation of Oral Evidence in Native Title Claims*, Native Title Tribunal Occasional Papers Series No 3 (2002) 33.
137. For example, criminal trials require certain infrastructure such as cells, jury room etc that may be more difficult to accommodate.
138. The discussion here uses evidence restricted to women as an example; but the comments apply equally to evidence restricted to men. Fryer-Smith states that in traditional Aboriginal communities men and women possess knowledge which may not be divulged to members of the opposite sex by reason of the operation of customary law: see Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002).
139. See discussion under Part V 'Practice and Procedure – Gender restricted evidence', above p 232 and Proposal 34.
140. Bell D, 'Aboriginal Women and the Land: Learning from the Northern Territory experience' (Paper presented to the Perth Workshop on Aboriginal Land Rights, University of Western Australia, 1983) 11, quoted in Keely A, 'Women and the Land: The problems Aboriginal women face in providing gender restricted evidence' [1996] *Indigenous Law Bulletin* 35.
141. (1997) 76 FCR 492. The decision was upheld by the Full Court of the Federal Court on appeal. The Full Court held that the court was entitled to prevent counsel (of a particular gender) representing a party for the purposes of protecting the integrity of the judicial process and ensuring that justice be done. The High Court declined to allow special leave on the point.
142. Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 48.

The orders allowed for the parties to apply for evidence to be restricted, and for objections to be heard. The orders limited the parties to 'no more than two lawyers of the same sex as the witness' to be present while evidence was being given. Importantly, the transcript of the restricted evidence could only be disseminated to certain persons, such persons also being of the same gender as the witness, except with the leave of the court. These orders were made pursuant to s 50 of the *Federal Court of Australia Act 1976* (Cth) which empowers the court to make orders necessary to 'prevent prejudice in the administration of justice'.¹⁴³

Section 171(4) of the *Criminal Procedure Act 2004* (WA) provides that the court may exclude certain persons or a class of persons from court and restrict publication of evidence where it is in the interest of justice to do so. Arguably, this section could be used to exclude one gender from a court hearing. Further, at common law a judge has the inherent power to ensure the fairness of proceedings, which could extend to the making of orders which restrict the taking and publication of evidence to a particular gender.¹⁴⁴ This power can also only be exercised when it is in the interests of justice to do so.

Whether it could be said to be in the interests of justice to make arrangements for a single gender hearing is a difficult question. This exercise requires the balancing of the competing interests of the particular witness (or party) who seeks to give gender restricted evidence and the administration of justice. Any restriction on evidence is likely to conflict with one of the fundamental principles of the Australian legal system; that is that the proceedings be public and that they be able to be openly scrutinised. It is therefore a very high threshold to require Aboriginal witnesses to establish that it is in the interests of justice that the evidence be restricted. If a witness would not give evidence without the restriction being in place, could that justify the restrictions in the interests of justice? The answer to this question will vary according to the nature of the evidence to be adduced in each case; however, it is likely that in many cases where customary law is relevant that it could not be established that it was the interests

of justice to take the far-reaching step of restricting the evidence to persons of one gender.

Lee J's orders in *Ward* were the subject of an appeal to the Full Court of the Federal Court which decided that, on the evidence, the trial judge could be satisfied that the cultural concerns of the private interests of the Aboriginal witnesses outweighed the public interest in the open administration of justice.¹⁴⁵ In each case it will depend on the evidence that the party seeking to impose the restrictions can adduce in support of its claim to a significant interest. As the author of the casenote observed, this could be somewhat counterproductive: providing this type of evidence in detail could compromise the very evidence that was sought to be restricted.¹⁴⁶

From a practical point of view, restricting evidence to persons of one gender is fraught with difficulties. Even if in a criminal trial it were possible to have a female judge, associate, lawyers and jury, what would happen if the matter were appealed? What power would a court have to undertake that a section of transcript could never be shown to a member of the opposite gender? Also, while it could be argued in a criminal trial that the state must use a lawyer of the appropriate gender, in a civil matter, could the interests of justice allow a plaintiff to dictate to a defendant the gender of their representation? In view of these practical



143. This decision has been much criticised, and since then the native title legislation has been amended to make it, arguably, more stringent on such points. For a full discussion of the gender restricted evidence in the Federal court in the context of native title claims, see Neate G, 'Land Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the conference of the International Association of Forensic Linguists, Sydney, 11 July 2003) 15, 49–52.

144. Fryer-Smith S, *Aboriginal Benchbook for Western Australian Courts* (Melbourne: Australian Institute of Judicial Administration, 2002) [7.4.9].

145. Case note: 'Gender Restricted Evidence: *State of Western Australia v Ben Ward*; unreported WAG 57 of 1997', [1998] *Indigenous Law Bulletin* 20. Special leave to appeal was refused by the High Court on 20 October 1997.

146. *Ibid.*

problems the Commission's view is that the convening of single gender courts is not a realistic option. Further, most gender restricted material (in matters that do not pertain to native title) is likely to be of a more limited nature, and therefore conducive to protection by other measures proposed in this part. Allowances could be made—through suppression orders and orders not requiring witnesses to speak—for witnesses to reveal in their evidence only information that will not breach their customary law. Nonetheless, in recognition of the difficulties that could be posed by the working out of such orders it is proposed that in appropriate cases a judge of the appropriate gender could be assigned to a matter.

Proposal 86

That amendments be made to the rules governing procedure to allow an application to be made to the Chief Justice of the Supreme Court, the Chief Justice of Family Court, the Chief Judge of the District Court or the Chief Magistrate for a judge or magistrate of a particular gender to be assigned to a matter in which gender restricted evidence is likely to be heard.

is whether others in the hearing should also be prevented from using the word or name, bearing in mind that it may be offensive to Aboriginal people. Neate has observed that in native title hearings it is sometimes possible to refer to a deceased person, not by name but by reference to that person's relationship to another.¹⁴⁹ The Commission considers that out of respect for Aboriginal people a court should have the power to prohibit any reference to offensive matters during the court proceedings, provided that to do so does not unduly interfere with the administration of justice.

Proposal 87

That the *Criminal Procedure Act 2004* (WA) be amended to provide that a court may order that certain information not be referred to in proceedings if the court is satisfied that reference to that information would be offensive to an Aboriginal person or community because of Aboriginal customary law, provided that to do so is not contrary to the administration of justice.

Not speaking about certain matters

In some circumstances customary law may prevent a witness from saying certain words, for example the name of recently deceased person, or someone going through the law.¹⁴⁷ Taking a practical approach, the court can often work around such matters; for example, some judicial officers in Western Australia avoid mentioning the name of a deceased Aboriginal person in court.¹⁴⁸

There are two considerations here. The first is that it may be prohibited for a witness to say certain things in court and that may be a barrier to them giving evidence. In those circumstances, the court can exercise its discretion to allow the witness to remain silent on that point, on the basis that they are therefore not providing evidence upon which the court can rely. The question

Suppression of information

The second consideration is the prevention of publication of the material outside the court. Where a practical course has been adopted to take account of the customary law consideration inside the courtroom, does the court have power to order that secret information not be published, or otherwise disseminated? Section 171(5) of the *Criminal Procedure Act 2004* (WA) permits a court to restrict the publication of anything that may lead to the identification of the victim, and it is suggested that this provision could be employed to protect the name of a deceased person.¹⁵⁰ However, this section is not of wide enough application to restrict publication of other culturally sensitive information. Section 57 of the *Evidence Act 1939* (NT) provides that a court has the power to prohibit the publication of the name of a party or a witness if publication would be likely to offend against public decency. In *R v B*¹⁵¹ this section was relied upon to

147. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA Project No 94, Background Paper No 15 (June 2005).

148. Williams V, *The Approach of Australian Courts to Aboriginal Customary Law in the Areas of Criminal, Civil and Family Law*, LRCWA, Project No 94, Background Paper No 1 (December 2003) 9. The Commission notes that in many of the sentencing cases where the deceased victim was Aboriginal the sentencing judge would generally refer to the victim as 'the deceased'. However, it is still common for the name of the deceased to be used when reading out the charge or when the prosecution read out a statement of material facts.

149. Neate G, 'Land, Law and Language: Some issues in the resolution of Indigenous land claims in Australia' (Paper delivered to the Conference of the International Association of Forensic Linguists, Sydney, 2003) 53.

150. Vincent P, *Aboriginal People, Criminal Law and Sentencing*, LRCWA Project No 94, Background Paper No 15 (June 2005) 40.

151. (1992) 111 FLR 463 (Mildren J).

prohibit the publication of the name of a deceased Aboriginal male who was the victim of a homicide. The court considered that, due to the high number of Aboriginal people living in the Northern Territory, publication of the victim's name would offend a large section of the public.

The Commission considers that a court should have the power to restrict the publication of culturally sensitive matters. Of course, there may be cases where publication of culturally sensitive material is necessary in the interests of justice. The court would be required to balance the need to ensure that the interests of justice are met; that the courts are open to the public; and that consideration is given to material that may be offensive to a person or community.

Proposal 88

That the following sub-sections be added to s 171(4) of the *Criminal Procedure Act 2004* (WA):

- (d) On an application by a party or on its own initiative, a court may make an order that prohibits the publication of any evidence if the court is satisfied that publication of, or reference to, the evidence would be offensive to an Aboriginal person or community by reason of matters concerned with Aboriginal customary law.
- (e) The court must not make such an order if it is satisfied that publication of, or reference to, the evidence is required in the interests of justice.

Protocols

It is suggested that the development of protocols for lawyers working with Aboriginal witnesses and clients could go a long way to assisting with many of the problems outlined above. As observed in Part V above, the Northern Territory has developed such protocols which are designed to avoid problems arising from miscommunication between non-Indigenous lawyers and their Indigenous clients. There are three main

protocols: a test to determine whether the client requires the services of an interpreter; an obligation on the lawyers to fully explain their role; and a requirement to use plain English. The protocols also contain information about cultural differences and aspects of Aboriginal customary law. The Law Society of Western Australia is in the process of adapting these protocols for use in this state.¹⁵² It is suggested that these protocols would be directed not only to those seeking to lead evidence from Aboriginal witnesses, but also to encourage counsel to object to questions asked of an Aboriginal witness that, because of the witness's linguistic and cultural background, are inappropriate.¹⁵³

Writing about the manner in which evidence was elicited from Aboriginal witnesses in the Stolen Generation Case,¹⁵⁴ Martin Flynn and Sue Stanton asserted that there is a need for protocols to be developed that would govern the way that evidence is received, and that it may be appropriate for the court to become involved in the process. They proposed that a 'reconciliatory approach' to litigation be adopted based on expert techniques for ensuring that Aboriginal evidence can be adduced in a manner that 'comes with the rules of evidence, is fair to the witness and does not prejudice the interests of parties to the legislation'.¹⁵⁵

Facilitators

Many comments made to the Commission in the course of the consultations concerned the fact that Aboriginal people coming before the courts wanted more information about the court process. It is accepted that the present resources of the Aboriginal Legal Service do not permit the kind of time-consuming assistance that was sought. In Armadale it was said that children appearing in court did not understand appropriate dress, manners, stance and other matters of demeanour and deportment which made their appearances in court unnecessarily difficult.¹⁵⁶ Aboriginal people said they need more help to understand how the court system works.¹⁵⁷ It appears that some of the assistance being sought from (and provided by) many interpreters is of this nature. It is suggested that

152. Telephone communication with Alison Gaines, Executive Director of the Law Society of Western Australia, 6 October 2005. See also discussion on interpreters under 'Overcoming Difficulties of Aboriginal Witnesses in the Court Process', above pp 401–406.

153. QCJC, *Aboriginal Witnesses in Queensland's Criminal Courts* (1996) Recommendation 4.3.

154. *Cubillo & Gunner v The Commonwealth* [1999] FCA 518.

155. Flynn M & Stanton S, 'Trial by Ordeal: The stolen generation in court' (2000) 25(2) *Alternative Law Journal* 75, 77.

156. LRCWA, Project No 94, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 25.

157. LRCWA, Project No 94, *Thematic Summaries of Consultations – Midland*, 16 December 2002, 37; *Fitzroy Crossing*, 3 March 2004, 45; *Pilbara*, 6–11 April 2003, 15.

facilitators whose specific task is to explain court procedure would be of assistance not just in performing that function, but also in alleviating some of the burden on interpreters.

In Discussion Paper 69 the ALRC proposed that 'facilitators' be employed to provide assistance to Aboriginal people to understand the court process:

[I]nterpreters and court facilitators [should] be used to overcome the difficulties experienced by Aboriginal [people] in giving evidence. The facilitators would assist the [people] in giving their evidence and understanding the proceedings, and would assist the court in understanding Aboriginal [people's] demeanor and behaviour in court.¹⁵⁸

At present there is not a sufficient number of Aboriginal Liaison Officers employed by Western Australian courts¹⁵⁹ to carry out this kind of day-to-day role.

If the Commission's proposal for the establishment of community justice groups (discussed in Part V)¹⁶⁰ is accepted, then part of their role might be to provide assistance to Aboriginal witnesses and to ensure that any customary law considerations applicable to a matter in court are respected and brought to the attention of the court. If community justice groups are not established, or are not established in a particular location, then the Commission is of the view that specialised court facilitators should be trained to assist witnesses in metropolitan and country courts.

Proposal 89

That the Department of Justice employ court facilitators to work with the Aboriginal Liaison Officer to the Courts to provide assistance to Aboriginal people giving evidence in court and to ensure that regard is given to issues of customary law in court proceedings.

Cultural Awareness Training for Judicial Officers

During the consultations there were numerous suggestions for regular or improved cultural awareness training for judicial officers.¹⁶¹ It was suggested that understanding of Aboriginal customary law could be enhanced by visits to Aboriginal communities¹⁶² and that cultural awareness training should be delivered by local Aboriginal people.¹⁶³ During the Pilbara consultations it was thought that there should be a 'bush meeting' with Elders and judges.¹⁶⁴ In Mirrabooka it was stated that Elders should be involved in cultural awareness training.¹⁶⁵

The need for adequate cultural awareness training for judicial officers has been recognised by various other inquiries.¹⁶⁶ Natalie Siegel has suggested that the level of cultural awareness in Magistrates Courts is currently dependent upon the willingness of individual magistrates to inform themselves of local issues. She reported that one magistrate in Western Australia allegedly refused an invitation from an Aboriginal community to visit and learn about their culture.¹⁶⁷ Siegel recommended that cultural awareness training about the particular community, and undertaken by members of that community, is imperative.¹⁶⁸

In Western Australia the Chief Magistrate is responsible for the training and education of all magistrates.¹⁶⁹ The Commission has been advised that Aboriginal people have been involved in conducting presentations to magistrates about relevant issues concerning Aboriginal people at the annual Magistrates Conference as well as other conferences.¹⁷⁰ Similarly, in the District Court there have been cultural awareness courses presented by Aboriginal people.¹⁷¹ The Supreme Court of Western Australia initiated Aboriginal cultural awareness training in 1993 in conjunction with the Australian Institute of Judicial Administration.¹⁷² The Commission understands

158. ALRC, *Review of the Uniform Evidence Acts*, Discussion Paper 69 (2005) [5.28].

159. The Commission notes that the Family Court is currently in the process of employing an Aboriginal Liaison Officer for that jurisdiction.

160. See Part V 'The Commission's Proposal for Community Justice Groups', above pp 133–41.

161. LRCWA, *Thematic Summaries of Consultations – Warburton*, 3–4 March 2003, 9; *Geraldton*, 26–27 May 2003, 16; *Broome*, 17–19 August 2003, 21–22; *Bunbury*, 28–29 October 2003, 11; *Albany*, 18 November 2003, 19.

162. LRCWA, *Thematic Summaries of Consultations – Armadale*, 2 December 2002, 16; *Kalgoorlie*, 25 March 2003, 27.

163. LRCWA, *Thematic Summaries of Consultations – Bunbury*, 28–29 October 2003, 11.

164. LRCWA, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003, 2.

165. LRCWA, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002, 9.

166. See NTLRC, *Report of the Committee of inquiry into Aboriginal Customary Law* (2003) 4, Recommendation 1; RCIADIC, *Report of the Royal Commission into Aboriginal Deaths in Custody* (1991) [22.4.27] Recommendation 96.

167. Siegel N, 'Bush Courts of Remote Australia' (2002) 76 *Alternative Law Journal* 640, 649.

168. *Ibid* 651.

169. *Magistrates Court Act 2004* (WA) s 24(4).

170. Letter to the LRCWA from the Chief Magistrate of Western Australia, 15 November 2005.

171. Letter to the LRCWA from the Chief Judge of the District Court of Western Australia, 16 November 2005.

172. Letter to the LRCWA from the Chief Justice of the Supreme Court of Western Australia, 5 December 2005. The pilot program introduced in 1993 in the Supreme Court of Western Australia has been used as a model for other courts and judicial officers. In addition the Supreme Court employs an

that where possible, programs are presented by local Aboriginal people. Judicial officers in the Supreme Court are strongly encouraged to attend. The Commission notes that the *Aboriginal Benchbook for Western Australian Courts*, which is an extremely useful resource, is made available to all magistrates and judges.¹⁷³ The Commission would hope that this Discussion Paper would also be made available to all judicial officers in Western Australia.

The Family Court of Western Australia has advised the Commission that currently there is no cultural awareness program for judicial officers in the Family Court. Some judicial officers do attend external cultural awareness courses.¹⁷⁴ The Family Court of Western Australia is presently considering the appointment of Aboriginal liaison officers to work in the court.¹⁷⁵ Although the details of this proposed scheme are yet to be finalised, the Commission supports the involvement of Aboriginal people in the Family Court. As far as the Commission is aware there is no cultural awareness training yet available for members of the State Administrative Tribunal.

The Commission is of the view that all judicial officers in Western Australia (including justices of the peace) should undertake cultural awareness training. This training should include aspects of Aboriginal customary law that are relevant to the particular jurisdiction of the court and those matters that Aboriginal people consider it is appropriate to discuss. Because of the diversity in customary law and other cultural issues between Aboriginal communities it is necessary for judicial officers to be made aware of the particular local cultural practices and conditions and courses should reflect this.

The cultural awareness training should include specific reference to the kinds of difficulties faced by Aboriginal witnesses set out above, and to the procedural measures that can be put in place to assist with those problems. In particular it should include:

- familiarising participants with the different thought system and knowledge tradition of Aboriginal people;
- raising awareness of language issues, in particular the use of Aboriginal English and the fact that it does not equate to Standard English or mean that a witness can understand Standard English;
- emphasising the benefits of and issues associated with witnesses giving evidence in groups;
- emphasising the benefits of and issues associated with taking evidence on country; and
- providing information about gender restricted evidence and the ways in which hearings can be structured to allow such evidence to be heard.

In making this proposal the Commission recognises that adequate resources must be provided, not only to engage Aboriginal presenters and design effective courses but also to ensure that there is proper provision for judicial officers to have time to engage in the process without detriment to the function of the courts in each relevant jurisdiction.

Proposal 90

That all Western Australian courts (including the State Administrative Tribunal) implement Aboriginal cultural awareness training.

That the Western Australian government provide adequate resources to implement this proposal by ensuring that there are sufficient funds to develop programs, engage Aboriginal presenters without adversely affecting the work of the courts.

Where a judicial officer is required to regularly sit at a particular location, *local* cultural awareness should be encouraged.

The Commission encourages members of a community justice group to participate in cultural awareness training.

Aboriginal Liaison Officer to advise members of the court about cultural issues and this officer is a member of the Chief's Justice's Aboriginal Liaison Committee.

173. Letter to the LRCWA from the Chief Magistrate of Western Australia, 15 November 2005; Letter to the LRCWA from the Chief Judge of the District Court of Western Australia, 16 November 2005.

174. Letter to the Commission from the Chief Judge of the Family Court of Western Australia, 16 November 2005.

175. Ibid.

PART X

Aboriginal Community Governance in Western Australia

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Aboriginal Community Governance

It is recognised that the effects of colonisation have largely undermined the traditional Aboriginal power structures and relationships that give customary law its vitality, legitimacy and authority. The Commission's consultations revealed that many Aboriginal people see reclaiming traditional values through recognition of customary law as an important way to address these deficits.¹ However, it is arguable that the Commission's proposals for the recognition of Aboriginal customary law and the accommodation of cultural beliefs (set out in the previous chapters) will be meaningless if more is not done to advance the broader objective of empowering Aboriginal communities to reclaim control over their own destinies.

Like all other systems of law, Aboriginal customary law cannot be divorced from its cultural and social contexts. While recognition of customary law may assist Aboriginal people to revive or consolidate aspects of their culture, there exists a multitude of problems of Indigenous disadvantage that impact negatively upon Aboriginal peoples' social wellbeing.² As discussed in Part II, many of these problems stem from, or are exacerbated by, inadequate or culturally inappropriate government service provision; in particular, service delivery at the local and regional levels. While a genuine whole-of-government approach to the delivery of services to Aboriginal people (as proposed in Part II) is crucial to overcoming problems of Indigenous disadvantage, greater benefit to Aboriginal people will undoubtedly flow from enhancing Aboriginal participation in the institutions that govern their lives.³ The following discussion details the existing status of Aboriginal community governance in Western Australia and looks at what is being done (and what more can be done) to maximise opportunities for greater Aboriginal participation in decision-making and encourage more effective and appropriate community governance processes.

The Indigenous Right to Self-Determination

At international law, self-determination is considered a fundamental human right. The *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic Social and Cultural Rights* (ICESCR) share a common Article 1 which provides that:

- (1) All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
- (3) The State Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realisation of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

While the Article provides some notion of what may be involved in the concept of self-determination, it does not define the term or identify the substantive forms that self-determination may take. Additionally, as former Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas has pointed out, the phrase 'all peoples' is somewhat misleading because there is 'no internationally agreed definition of a "peoples"'.⁴ This lack of definition is reflected in *ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries* which states in

1. See, for example, Law Reform Commission of Western Australia (LRCWA), Project No 94, *Thematic Summaries of Consultations – Geraldton*, 26–27 May 2003, 13; *Rockingham*, 9 December 2002, 5; *Cosmo Newbery*, 6 March 2003, 20; *Carnarvon*, 30–31 July 2003, 4; *Broome*, 17–19 August 2003, 25–26; *Manguri*, 4 November 2002, 6; *Bunbury*, 28–29 October 2003, 8.

2. See the lengthy discussion of Indigenous disadvantage in Part II, above.

3. Christine Fletcher has argued that states that, 'inequities between black and white Australians—such as Indigenous peoples' poor health, inadequate housing, lack of community infrastructure and disproportionate representation in the criminal justice system—are symptomatic of political deprivation, not separate public administration problems.' Fletcher C, 'Living Together but not Neighbours: Cultural Imperialism in Australia' in Havemann P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (1999) 335.

4. Aboriginal and Torres Strait Islander Social Justice Commissioner, *ibid*.

Article 1(3) that:

The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law

In fact it has been argued that because the right to self-determination found in the ICCPR and the ICESCR was framed in relation to colonial peoples, it has no application to indigenous populations within nation states.⁵ However, both the United Nations Human Rights Committee and the Committee on Economic, Social and Cultural Rights have interpreted common Article 1 'as applying to the situation of indigenous peoples'.⁶

Article 3 of the *United Nations Draft Declaration on the Rights of Indigenous Peoples* ('the Draft Declaration') seeks to resolve the dilemma at international law by taking the formula found in the ICCPR and the ICESCR and making it specific to indigenous peoples. It also attempts to elaborate upon the scope of the right to self-determination by providing in Article 31:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.⁷

It will be noted that there is nothing in this Article that would suggest that self-determination includes the right

to secede from the nation state or claim sovereignty over territory,⁸ yet according to Jonas:

Australia is one of only four countries that actively pursue the rejection of Indigenous peoples' self-determination and collective rights in the annual negotiations on the Draft Declaration... In both the domestic and international arenas, Australia's opposition to recognition of a right to self-determination has been based on simplistic, and often legally incorrect, assumptions which present self-determination as purely symbolic, as a catchcry for all the failings of Indigenous policy in the past thirty years, or as 'a rigid choice between all or nothing – between the forming of an independent state or complete denial of a cultural and political identity'.⁹

Jonas argues that 'the reality of Indigenous self-determination...lies between these extremes and is [an ongoing] process of negotiation, accommodation and participation'.¹⁰ This view is supported by Erica-Irene Daes, the Chairperson of the United Nations Human Rights Sub-Commission Working Group on Indigenous Populations (the group responsible for the preparation of the Draft Declaration), who states that 'the right of self-determination of Indigenous peoples should ordinarily be interpreted as their right to freely negotiate their status and representation in the [nation] State in which they live'.¹¹ This is known as 'internal self-determination', signifying rights to full and effective political participation within the nation state (pursuant to Article 31 of the Draft Declaration) but not threatening the state's territorial integrity.¹² The explanatory note accompanying the Draft Declaration makes plain that only in circumstances where a nation state's dominant political system 'becomes so exclusive and non-democratic that it no longer can be said to be

5. See, for example, Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005) 9.
6. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) 188.
7. This Article and the other provisions of the Draft Declaration are subject to the qualification in Article 45 that '[n]othing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations'.
8. The fact that Article 31 of the Draft Declaration does not address land rights as part of self-determination, but is limited to 'increased rights within a mutually beneficial relationship within the state' is seen by some commentators as a significant compromise of the original ideal of self-determination as 'emancipation for a subjugated people'. Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005) 8.
9. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>> (footnote omitted).
10. Ibid.
11. Daes E, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (12 June 1993) 6 as cited in Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 23.
12. In contrast to 'external self-determination' which is generally considered to involve a right to separate from the existing state. However, Jonas makes clear that there are important external elements to the achievement of meaningful 'internal' self-determination within a state. These include the right to participate in international negotiations and involvement 'in international organisations where decisions are taken that affect core aspects of [indigenous peoples'] existence and development'. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>. The creation of the United Nations Permanent Forum on Indigenous Issues offers indigenous peoples the opportunity to participate more directly in negotiations and decisions at an international level. For more information on the Permanent Forum and other indigenous-specific mechanisms within the United Nations system see above Part IV and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 6.

To effectively engage with Aboriginal people in pursuing these aspirations it is necessary to consider ways of giving Aboriginal people greater control over, and substantive power within, the decision-making processes that affect their lives.

“representing the whole people”¹³ is secession likely to be considered justified.¹⁴

Indigenous Self-Determination in the Western Australian Context

Acknowledging the limitations placed upon the Indigenous right to self-determination at international law, Indigenous organisations in Australia have indicated that they do not seek to push a separatist agenda, but rather seek to renegotiate their relationship with governments and their political status within the nation.¹⁵ Jonas has observed that:

In the Australian context, Indigenous peoples are so numerically inferior and geographically dispersed that it is nonsense to suggest that the creation of separate states would be feasible... At no stage have any Indigenous Australians participating in international negotiations on self-determination suggested that secession is a realistic option.¹⁶

These sentiments were confirmed by Aboriginal people during the Commission's community consultations where, although the concept of self-determination was raised,¹⁷ at no stage was a desire for a separate state or political system expressed. In fact the opposite was the case, with most communities indicating a strong desire to cooperate, and work in partnership, with government.¹⁸ This is not to suggest that claims to

Aboriginal territory (especially pursuant to native title rights) are not important to the Aboriginal peoples of Western Australia. Aboriginal peoples' responsibility to, and relationship with, the land is of enormous cultural significance and is an important manifestation of the Indigenous right to self-determination. Although consideration of native title is outside the Commission's Terms of Reference, the Commission respects Indigenous interests in land and natural resources and supports the continuing improvement of processes that recognise these interests.

Within the Commission's Terms of Reference it is noted that the aspirations of Aboriginal people in Western Australia are focused on, but not confined to, the pursuit of self-determination in relation to economic, social and cultural development. For the state to effectively engage with Aboriginal people in pursuing these aspirations it is necessary to consider ways of giving Aboriginal people greater control over, and substantive power within, the decision-making processes that affect their lives. This requires a re-examination of current systems of community governance. While the Commission does not pretend to address all issues with the present system of Aboriginal community governance in Western Australia, the following offers a critique on the system and suggests some guiding principles and a framework for future reform.

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13. Daes E, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples*, UN Doc E/CN.4/Sub.2/1993/26/Add.1 (12 June 1993) [21]. This is supported by the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations* (1970) which states that the recognition of the right of all peoples to self-determination shall not 'be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principles of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour'.
 14. As former Aboriginal and Torres Strait Islander Social Justice Commissioner Bill Jonas has observed, although '[s]ecession is an extreme expression of self-determination... It cannot be absolutely discounted as a possible expression of self-determination. The situation in East Timor is an excellent example of why it should not be discounted'. *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
 15. Cunneen C & Schwartz M, *Customary Law, Human Rights and International Law: Some Conceptual Issues*, LRCWA, Project No 94, Background Paper No 11 (March 2005) 23–24.
 16. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2, <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
 17. LRCWA, Project No 94, *Thematic Summaries of Consultations – Mirrabooka*, 18 November 2002; *Armada*, 2 December 2002.
 18. See, for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Pilbara*, 6–11 April 2003; *Broome*, 17–19 August 2003; *Carnarvon*, 30–31 July 2003; *Mirrabooka*, 18 November 2002.

A Note about Terminology

The Commission is aware of the broader discourse surrounding the use of the terms 'self-determination',¹⁹ 'self-government'²⁰ and 'self-management'²¹ in relation to Australian and international Indigenous affairs. In particular, the Commission notes that whilst potentially having quite different meanings, these terms are often used interchangeably by commentators (including by government) and that no real agreement appears to have been reached in relation to precise definitions of these terms.²² Although the proposals of the Commission feature aspects of all three concepts, in the following discussion the Commission has preferred to avoid any misunderstanding of its intention by employing, where possible, the politically neutral term 'community governance'.

Governance Issues in WA Aboriginal Communities: the Impetus for Reform

Indigenous Disadvantage and Inequality of Government Service Provision

Part II of this Discussion Paper, which outlines issues of concern to Aboriginal people raised during the Commission's community consultations, paints a picture

of entrenched Indigenous disadvantage among Western Australian Aboriginal communities. Much of this disadvantage, it was revealed, stems from a lack of infrastructure and essential government services to Aboriginal communities. Education, housing and health are among the government services discussed in Part II, while problems with law enforcement, especially in remote communities, are discussed in Part V. Part of the reason for problems of service provision to Indigenous communities lies in the complicated nature of relationships between the three levels of government—local, state and federal—responsible for the delivery of services.

Local government services

In Western Australia local government is responsible for the provision of basic essential services to constituents within the designated local government area. Essential services include the provision and maintenance of infrastructure such as local roads, footpaths, street lighting, stormwater drainage, parks and recreational facilities. It also has responsibilities such as town planning; building regulation and inspection, development approval; environmental health (such as food safety, waste disposal, effluent disposal and pest control), and the welfare and control of domestic animals, in particular dogs.

The provision of local government services is an area where Aboriginal communities in Western Australia have been found to be disadvantaged relative to non-

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19. As discussed above, self-determination has become a fluid—and perhaps compromised—concept that takes many forms in international and domestic legal discourse. See Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005); Kingsbury B, 'Self-determination and "Indigenous Peoples"' (1992) 86 *Proceedings of the 86th Annual Meeting of the American Society of International Law* 383; Gayim E, *The Principle of Self-Determination: A study of its historical and contemporary legal evolution* (Oslo: Norwegian Institute of Human Rights, 1990).
 20. The Harvard Project on American Indian Development in North America suggests that the key feature of self-governance is decision-making power. In practical terms this has been held to mean the existence of indigenous governing institutions and control over management of resources and allocation of funding free from external interference. Cornell S, 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States', paper delivered to the Indigenous Governance Conference, Canberra (3 April 2002) 2–3. See also *Report of the Royal Commission on Aboriginal Peoples: Renewal, A Twenty-Year Commitment* (Ottawa: Canadian Communication Group, vol. 5, 1996) 1–2. There is some debate about whether self-government is an inherent right (stemming from international law recognition of Indigenous peoples to freely determine their political status and economic, social and cultural development) or a delegated right (accorded to Indigenous peoples by a devolution of power from the existing state) and whether there is a need for territorial sovereignty for full exercise of self-government rights.
 21. In Australia, 'self-management' is a term often used to suggest that self-determination of indigenous peoples is being recognised and supported. The term usually infers a delegated right to make decisions related to economic management of communities with 'upwards' accountability to government. Recent manifestations of self-management include the policy of 'practical reconciliation' and shared responsibility agreements (the latter suggesting a degree of governing responsibility resting with Aboriginal communities, although the reality of involvement in decision-making processes relating to communities must be questioned). See Fletcher C, *Aboriginal Politics: Intergovernmental Relations* (Carlton: Melbourne University Press, 1992) 10; McCausland R, 'Shared Responsibility Agreements: Practical reconciliation or paternalistic rhetoric?' (2005) 6 (12) *Indigenous Law Bulletin* 9; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2 <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.
 22. For example, Joseph Castellino has referred to 'the multitude of meanings and varied interpretations of the right' to self-determination. Stephen Cornell of the Harvard Project on American Indian Development in North America has openly struggled with the meaning of self-government, describing it as 'a variable term' that may be 'wide or narrow in scope' while Tamara Kamien has noted that self-government 'does not have a clear definition'. Self-management appears to be a term of political convenience with Bill Jonas drawing attention to the fact that Australian governments have tended to use the terms self-determination and self-management 'almost interchangeably'. See, Castellino J, 'Indigenous Peoples and the Scope for Forgiveness and Reconciliation in International Law: Unpacking the intertemporal rule', paper delivered to the Commonwealth Law Conference, London (13 September 2005) 7; Cornell S, 'The Importance and Power of Indigenous Self-Governance: Evidence from the United States', paper delivered to the Indigenous Governance Conference, Canberra (3 April 2002) 2–3; Kamien T, 'Implementing Self-Government – An Examination of the *Aboriginal Communities Act 1979* (WA)' (1995) *Murdoch University E-Law Journal* [2.3]; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002* (2002) ch 2 <<http://www.hreoc.gov.au/social%5Fjustice/sjreport%5F02/chapter2.html#2.3>>.

Aboriginal communities in comparable geographic regions.²³ A study undertaken by the Department of Indigenous Affairs in 1999 identified a number of factors contributing to the inequality of local government service provision to Aboriginal communities including the difficulty of providing and maintaining infrastructure in remote areas; issues with tenure of land and capacity to levy council rates; the 'private' nature of Aboriginal communities (resulting in the perception of inability to access land for the purposes of service provision or infrastructure maintenance);²⁴ the fact that that because some Aboriginal communities are located on Aboriginal Lands Trust or Crown land, provisions of the *Health Act 1911* (WA) and *Local Government Act 1995* (WA) are not applicable and cannot be enforced by local government authorities; and the history of federal and state agencies circumventing local government approvals and involvement.²⁵ These factors are typically raised by local government to explain negligence of local government service provision to Aboriginal communities; however, a more accurate explanation can perhaps be found in the fact that the lack of rate income generated by Aboriginal communities has fostered a view that Aboriginal people are not genuine constituents of local government and are therefore not a priority.²⁶

Local governments receive state and federal funding (through the state's Local Government Grants Commission) according to a formula that specifically recognises Aboriginal population, remoteness and disadvantage factors.²⁷ Under the *Local Government (Financial Assistance) Act 1995* (Cth), National Principle 5 states that 'financial assistance shall be allocated [by the Local Government Grants Commission] in a way which recognises the needs of Aboriginal and Torres Strait Islanders within their boundaries'.²⁸ However, because funding is 'untied' (that is, the funding authority does not dictate the way in which the money

is to be spent), there is no direct accountability of local governments to ensure that Aboriginal-specific funding in fact reaches Aboriginal communities.²⁹ For example, it was noted in a 1999 Department of Indigenous Affairs report that only six per cent of the Aboriginal Environmental Health Allowance received by the Shire of Broome was actually spent on environmental health related services to Aboriginal communities on the Dampier Peninsula.³⁰ Although there are recent improvements to accountability via reporting requirements under the *Local Government (Financial Assistance) Act 1995* (Cth), these only require a non-benchmarked ministerial assessment of the delivery of local government services to Aboriginal communities. The Commission believes that more can be done by the state government (in particular, under the ministerial reporting requirement) to hold local governments accountable for the 'untied' funding that they receive from the Local Government Grants Commission for the purposes of providing for Aboriginal constituents.

Proposal 91

That the Western Australian government investigate ways of improving accountability of local governments for funding provided for the benefit of Aboriginal people in each local government area.

State and federal government services

Major essential services to Aboriginal communities (such as water, sewerage and power) are currently supplied by various Commonwealth and state bodies often with overlapping jurisdiction and an ad hoc mixture of Commonwealth and state funding sources. For example, under the Commonwealth-state bilateral agreement the Commonwealth is responsible for

23. Department of Indigenous Affairs, 'The Provision of Local Government Services to Aboriginal Communities: A focus paper', (November 1999) 2–3.
24. Ibid 9. In particular in respect of communities declared under the *Aboriginal Affairs Planning Authority Act 1972* (WA) where permits are required to enter community lands. Further, access roads to Indigenous communities are often private roads and, as such, councils have sometimes refused to take responsibility for their maintenance or provision. In recognition of this, in Western Australia, one third of the Special Road Works funding is directed to local governments specifically for the improvement and provision of roads.
25. Ibid 3.
26. Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity Building in Western Australia's Aboriginal Communities* (Canberra: North Australia Research Unit, Australian National University, 2000) 24. See also Department of Indigenous Affairs, *Building Stronger Communities* (2002) 17; Commissioner Patrick Dodson, RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [9.1]. Apart from the Shire of Ngaanyatjarra (Warburton)—the only 'Aboriginal-owned' local government body in Western Australia—Aboriginal interests are not strongly represented on councils and are not therefore accorded priority.
27. Department of Indigenous Affairs, 'The Provision of Local Government Services to Aboriginal Communities: A focus paper' (November 1999) 3–4.
28. Department of Transport and Regional Services, *2003–2004 Report on the Operation of the Local Governance (Financial Assistance) Act 1995* (2005) 104.
29. Department of Indigenous Affairs, 'The Provision of Local Government Services to Aboriginal Communities: A focus paper' (November 1999) 4.
30. Ibid.

communities of less than 50 residents or five permanent dwellings while the state government is responsible for gazetted communities with a greater number of residents or dwellings.³¹ Health services are also split between state and Commonwealth with some communities receiving health care provided by the state and others serviced by Aboriginal health organisations, which have a mixture of state and Commonwealth funding. As mentioned earlier, a key service provided by state government which is lacking in many remote communities is law enforcement. The issues surrounding policing on Aboriginal communities are canvassed in Part V. Other state-provided services include emergency services and public housing – these issues are discussed in Part II.

Addressing government service provision to Aboriginal communities in Western Australia

In the past the rhetoric of Aboriginal self-determination has allowed governments to abdicate their responsibilities to provide services that are an entitlement of citizenship which non-Aboriginal Australians take for granted. For example, the lack of law enforcement in remote communities (discussed in Part V) is largely a consequence of the perception that the *Aboriginal Communities Act 1979* (WA) ‘empowers’ communities to deal with their own law and order problems. There is also, the Commission suspects, a pervading misconception that targeted services for Aboriginal people are alternative, rather than supplementary, to mainstream services. In practice this has meant that many Aboriginal communities, in particular remote communities, receive inferior services (or, in some cases, none at all). This aspect of the service provision relationship between governments and communities is in the process of being addressed at a policy level, but there remains the significant challenge of carrying this policy through to those responsible for frontline service delivery. As highlighted throughout this Discussion Paper, the policy promises of governments in respect

of Indigenous affairs have not always been rendered in reality ‘on the ground’.

The current focus on outcomes of government service delivery programs (rather than policy and process) underpins the Council of Australian Governments’ (COAG) ‘National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders’.³² In response to this joint Commonwealth-state initiative there have been a number of important developments in the improvement of government service provision to Indigenous communities in Western Australia. These include:

- The introduction of benchmarks established by the COAG’s Steering Committee for the Review of Government Service Provision in response to indicators of Indigenous disadvantage and the assessment of the impact of government program and policy interventions.³³
- Government funding for ongoing mapping and gap analysis projects to improve inter-agency cooperation, identify local achievement in service delivery and alert government to gaps in services to Aboriginal people.³⁴
- The Commonwealth-state bilateral agreement on essential services (2000), which clearly delineates a role for local governments (as a subset of the state’s



31. Commonwealth of Australia, State of Western Australia and Aboriginal and Torres Strait Islander Commission, ‘Bilateral Agreement on the Provision of Essential Services’ (2000) 6–7.

32. *National Commitment to Improved Outcomes in the Delivery of Programs and Services for Aboriginal Peoples and Torres Strait Islanders* (1992), < <http://www.alga.asn.au/policy/indigenous/nationalCommitment.php>>.

33. See, SCRGSP, *Overcoming Indigenous Disadvantage: Key Indicators 2005* (July 2005).

34. Department of Indigenous Affairs, ‘Service Provision to Aboriginal People in the Town of Derby – West Kimberley’ (May 2005) 4.

responsibility) in the provision of essential services and in the planning and monitoring aspects of service provision. Bilateral agreements have also been negotiated on health (1996) and housing (2002).

- The development of the Aboriginal Communities Strategic Investment Program (a state government initiative in response to the findings of the Chief Executive Officer Working Party on Essential Services to Aboriginal Communities). The program targets large remote Aboriginal communities and aims to contribute to improvements in health and living standards through improved community management and administration; normalisation of power, water and sewerage services; and the increased involvement of local government in delivery of services. Under this program local government is envisaged to have a much greater role in identifying, developing and preserving key community infrastructure and assets.³⁵
- The negotiation of service agreements between local government bodies and Aboriginal communities. For example, the Shire of Derby West Kimberley has completed service agreements with the communities of Looma and Mowanjum which incorporate projects aimed at improving access to local government services and the optimisation of services. The Shire of Broome has completed a service agreement with Aboriginal communities on the Dampier Peninsula and at Bidyadanga. Three specific service agreements have now been signed, covering environmental health, building inspections and community layout planning.
- The *Statement of Commitment to a New and Just Relationship* (2001) which sets out the principles and processes for government and Indigenous interests to negotiate a statewide partnership framework to facilitate agreements at the local and regional level on service provision, justice outcomes and native title.

The partnership framework underpins advances in delivery of government services to Aboriginal communities in Western Australia. The success (or

otherwise) of this initiative will therefore have significant bearing on the realisation of improved services and infrastructure for Aboriginal people in this state. Perhaps in acknowledgement of this the government has recognised the significance of the institution of 'effective governance structures, political recognition and representation of the Indigenous people's status and [their] right to be involved in the decision-making that will impact upon their quality of life'.³⁶ The facilitation of Aboriginal participation in community governance is therefore crucial to the government's plans to address Indigenous disadvantage in Western Australia.

Facilitating Aboriginal Participation in Community Governance

The national emphasis on 'equalisation' of service provision has coincided with the recognition by government that the failure of previous service delivery approaches has much to do with Aboriginal communities being understood as 'passive recipients of services rather than active participants'³⁷ who determine their own needs and make decisions about how services are delivered. It has been observed throughout this Discussion Paper that the most effective solutions to the problems and disadvantage experienced by Aboriginal communities are those that are 'owned' by the community and respond to the particular conditions and cultural dynamics of the community.³⁸ Prior to its abolition in March 2005, the acting Chairperson of ATSIC described the importance of community participation in decision-making in relation to service delivery:

A central issue is how to empower people at the community and regional levels, so that policies and service delivery are driven by the people and the communities themselves. In this vision of the world as it should be, service delivery by governments and agencies is driven by the needs of the community rather than by one-size-fits-all policies and models which are imposed from above and afar. We want Indigenous people and communities to drive change and shape their own futures. But that means we have got to get two things right:

35. For a fuller discussion of this program see Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity Building in Western Australia's Aboriginal Communities* (Canberra: North Australia Research Unit, Australian National University, 2000); see also 'Aboriginal Communities Strategic Investment Program' <<http://www.dia.wa.gov.au/Policies/EnvironmentalHealth/ACSIP.aspx>>.

36. Department of Indigenous Affairs, 'Why is there so much talk about capacity building and what is it?' <<http://www.dia.wa.gov.au/Policies/Communities/Why.aspx>>.

37. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 81.

38. See, for instance, the Commission's discussion of the need for culturally appropriate responses to address the issues of family violence and child abuse in Indigenous communities: Part VII, above pp 352–53.

- the capacity of community members and the community as a whole to make good policy and to campaign and negotiate for the outcomes they want; and
- the good governance and self-management of Aboriginal and Torres Strait Islander people at national, regional and local levels.³⁹

Not only is community participation crucial to ensuring that Indigenous needs are met in a demand-responsive and culturally appropriate way, it has also been observed that 'participation by Aboriginal communities in the process of implementing governmental policy and programs is necessary if they are to raise their administrative and decision-making capacities'.⁴⁰ The realisation of effective Aboriginal community governance and the reduction of Indigenous disadvantage therefore depend upon the development of management capacity within communities.⁴¹

Capacity building and governance

The Aboriginal and Torres Strait Islander Social Justice Commissioner's *Social Justice Report 2001* defines 'capacity building' and 'governance' as follows:

Capacity Building relates to the abilities, skills, understandings, values, relationships, behaviours, motivations, resources and conditions that enable individuals, organisations, sectors and social systems to carry out functions and achieve their development objectives over time.

Governance concerns the structures and processes for decision making, and is generally understood to encompass stewardship, leadership direction, control, authority and accountability.⁴²

Capacity building has become a catchcry of governments in recent years and now features as a significant element in policy responses to Indigenous disadvantage at all levels of government.⁴³ However, applying such a narrow focus to capacity building (that is, merely focusing on addressing service delivery issues in Aboriginal communities) may ultimately impede the

success of these policies. Capacity building must have a wider focus that keys into 'grass-roots' governance reform in Indigenous communities. Without this broader reform, the cultural objectives of Aboriginal communities are in danger of being overshadowed by the social and political objectives of normalising government service provision to Aboriginal communities. There is also the danger, expressed by the Aboriginal and Torres Strait Islander Social Justice Commissioner, that equating the development of capacity in Aboriginal communities with improvement in service delivery may 'co-opt the process of capacity building so that it reinforces the characteristics of the existing system, with all [its] structural problems'.⁴⁴

Although the capacity of communities to function more efficiently and positively interact with government service providers may be addressed by governance training programs currently being instituted in Aboriginal communities, it is important that community values are respected in this process. The effective representation of its members by a governing institution of an Aboriginal community will necessarily require education in the language and values of white institutions and the broader economy; but if government's ways of doing business with Aboriginal communities does not also change, then the social and economic problems currently restraining the progress of those communities will remain. The focus of capacity building must therefore also extend to building the capacity of government to engage in meaningful consultative partnerships with Indigenous people.⁴⁵

Obstacles to Effective Aboriginal Community Governance

Lack of economic base

The lack of an economic base to provide employment and create independent self-supporting communities is a major obstacle to governance reform in Aboriginal communities. It contributes to a range of social

39. ATSIAC, *Annual Report 2002–2003* (2003) 9 as cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 62.

40. Gerritsen R, Crosby J & Fletcher C, *Revisiting the Old in Revitalising the New: Capacity Building in Western Australia's Aboriginal Communities* (Canberra: North Australia Research Unit, Australian National University, 2000) 24. See also Department of Indigenous Affairs, *Building Stronger Communities* (2002) 18.

41. Ibid.

42. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001* (2001) 67.

43. A major study into capacity building in relation to service delivery in Aboriginal communities was undertaken between 2002 and 2004 by the Parliament of Australia, House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (SCATSIA). The Committee reported in June 2004. See, SCATSIA, *Many Ways Forward: Report of the inquiry into capacity building and service delivery in Indigenous communities* (June 2004). It is noted that the international literature is beginning to embrace the term 'capacity development' (focusing on sustainable governmental capacity developed over time) rather than capacity building.

44. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2003* (2003) 77.

45. The imperative of capacity building directed to government has also been stressed by the Department of Indigenous Affairs (DIA). See DIA, *Services to Discrete Indigenous Communities in Western Australia*, Discussion Paper (September 2002) 26–29.

problems, from competing for scarce resources to—particularly amongst Aboriginal youth—lack of hope and self-esteem and consequent substance abuse. Noel Pearson has observed:

The development of self-sufficiency of Aboriginal communities is a long term agenda. Communities are not even going to make modest inroads into self-sufficiency in the next few years. Economic development is a generational challenge and it will be one of the hardest to overcome. This is because of the lack of resources, the need for education and training, and all of the problems that attend economic development in remote Australia. Remote Australia is not an easy place to get economic enterprises going. The least skilled, least resourced people are living in the areas of Australia where it is hardest to get economic development going. That is our predicament.⁴⁶

Remote and rural Aboriginal communities clearly face a difficult task in attaining economic self-sufficiency and in the short-term are almost completely dependent on government welfare or funding of community development and employment programs.⁴⁷ The type of funding (whether block grants or specific purpose funding) and its source will usually dictate the degree of Aboriginal control over decisions about how money is allocated; however, there is always some degree of external control over the expenditure of public monies and in the past resource application has been almost entirely managed by city-based bureaucrats. In contrast, monies drawn from community enterprises—such as art production, lease of land to mining or pastoral interests, or harvesting of seed for revegetation projects—may be applied as the community (or individual beneficiaries) sees fit; thereby increasing Indigenous control of decision-making and developing management capacity within the community. The development of sustainable economic projects within Aboriginal communities therefore represents a crucial step toward self-determining effective community governance.

Education, training and recruitment of staff

At present there is an over-reliance on non-Aboriginal staff in community governing organisations which

creates three significant problems. First, reliance on non-Aboriginal staff decreases opportunities for building capacity and social capital within Aboriginal communities. Second, having non-Aboriginal people speaking for the community means that interactions with government are more likely to be carried out on non-Aboriginal terms emphasising non-Aboriginal values and diminishing constituent representation. And third, because of the remoteness, cultural difference and inferior service provision of many Aboriginal communities there is considerable difficulty in attracting and retaining quality, ethical staff.⁴⁸

It has also been observed that Aboriginal community organisations are not supported in their own management – that they are only funded to deliver services. In the context of ‘limited skills and experience, social, economic, and educational disadvantage, isolation and absence of support’,⁴⁹ the requirements placed by funding agencies on accountability to government consumes such a degree of human and financial resources that the organisation’s attention is diverted away from the needs of the community. As a result the community is disadvantaged and the organisation fails in performance evaluation, which in some cases results in funding being withdrawn.

Feuding and dysfunction

Most contemporary Aboriginal communities can be said to have emerged through the process of colonisation, dislocation and the amalgamation of tribes or peoples that may have no historical connection. Many Aboriginal people no longer live on their ancestral lands and social organisation within some communities may have only tenuous ties to traditional Aboriginal society. While these factors do not necessarily dilute the force of Aboriginal culture and laws, they may contribute to social conflict or dysfunction and the factionalisation of governing institutions within communities.

During its consultations the Commission heard repeated accounts of serious family feuding that has debilitated communities and undermined authority structures (whether traditional or otherwise).⁵⁰ Pearson has observed that nepotism and family feuding are a major

46. Pearson N, *Our Right to Take Responsibility* (Cairns: Noel Pearson & Associates, 2000) 55.

47. The role of the government subsidised Community Development Employment Project (or CDEP) and its importance, particularly to remote Aboriginal communities, is discussed in Part II, above pp 37–38.

48. Department of Indigenous Affairs, *Building Stronger Communities: Capacity building with Indigenous communities being undertaken by the WA Department of Indigenous Affairs* (2002) 19.

49. Kimberley Community Management Services, ‘Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry into Capacity Building in Indigenous Communities’ (August 2002) 2.

50. See, for example, LRCWA, Project No 94, *Thematic Summaries of Consultations – Carnarvon*, 30–31 July 2003, 6 & 7; *Geraldton*, 26–27 May 2003, 13, 14 & 17; *Broome*, 17–19 August 2003, 27; *Bunbury*, 28–29 October 2003, 14 & 16; *Albany*, 18 November 2003, 21; *Armada*, 2 December 2002, 25; *Midland*, 16 December 2002, 40.

obstacle to Indigenous progress and a drain on political energies.⁵¹ Pearson also believes that community disputation has led to lost opportunity for Aboriginal people and a diminution of goodwill.⁵² Nevertheless, there has been some success in dealing with family feuding in institutional design. Pearson cites the example of the Coen Regional Aboriginal Corporation, which overcame its governance difficulties by designing a structure that recognised community factions and ensured representation of all interests.⁵³ Similar results have been achieved at Bidyadanga in Western Australia where skin groups are represented on the community's governing council. It will also be noted that the Commission's proposal for community justice groups, set out in Part V above, envisages constituent representation of all family or skin groups in addition to equal gender representation to address issues of factional conflict and to enhance the legitimacy and consequent authority of the groups.⁵⁴

Breakdown of cultural authority

Contributing to dysfunction within many Aboriginal communities is the apparent breakdown of the cultural authority of Elders. The Commission's consultations yielded many references to Aboriginal peoples' concern about diminishing regard for Elders, particularly by Indigenous young people.⁵⁵ This breakdown is undoubtedly a continuing consequence of colonial dislocation of Aboriginal peoples from their traditional land, past government policies of removal of Aboriginal children from their cultural context and the forced unification of different Aboriginal tribes on reserves and missions. However, there are contemporary factors that contribute to this problem. In his background paper for this reference John Toohey suggests that the disintegration of traditional authority may be attributed in some cases to the emergence of alternative authority structures imposed by the current scheme of community

governance in Western Australia, namely, community councils.⁵⁶ Toohey observes that Aboriginal community councils are merely

a consequence of government funded [sic] and the requirement of incorporation in order to receive money and to account for it. Those who comprise such councils are generally not chosen because of their deep knowledge of traditional matters. Rather they are more likely to be chosen by the community because they are younger, articulate in the English language, and have the ability to deal with the service providers and with the complexities of maintaining those services. The importance which those councils inevitably assume may at times overshadow the standing of those who would ordinarily be regarded as the 'elders'.⁵⁷

These observations invoke the significance of institutional design in relation to Aboriginal community governance.

Institutional design

Many commentators see the obstacles to improving living conditions in Aboriginal communities—such as lack of community participation, inappropriate allocation of resources and community dysfunction—as arising from the inappropriate structure of institutions that operate in the Indigenous domain. As Sullivan has observed 'more effective delivery of welfare lies not in more efficient bureaucracy but in changing the structure of delivery to accommodate Aboriginal ways of doing things'.⁵⁸ This would necessarily take into account the views of the community and facilitate greater individual participation in the process. Writing of First Nations peoples in Canada, Paul Havemann has observed that there is a 'fundamental chasm' between the tradition-oriented worldview of indigenous peoples and the world of modernity brought by colonisation.⁵⁹ For Havemann, the question is how to design institutions that recognise this difference and do not impose white

51. Pearson N, *Our Right to Take Responsibility* (Cairns: Noel Pearson & Associates, 2000) 48.

52. ABC Radio National, *Background Briefing* (29 October 2000), < <http://www.abc.net.au/cgi-bin/common/printfriendly.pl?http%3A/www.abc.net.au/rn/talks/bbing/stories/s203074.htm> >.

53. Pearson N, *Our Right to Take Responsibility* (Cairns: Noel Pearson & Associates, 2000) 69.

54. See Part V, 'Community Justice Mechanisms – Membership'; above pp 134–35.

55. Such sentiments were repeated throughout the Commission's consultations with communities, including with the more remote Western Australian communities: see generally the Commission's *Thematic Summaries of Consultations*. See also the comments of community members in Roebourne recorded in Kathy Trees' case study: Trees K, *Contemporary Issues Facing Customary Law and the General Legal System: Roebourne – A Case Study*, LRCWA, Project No 94, Background Paper No 6 (November 2003). In relation to children and youth, these matters are discussed in more detail in Part II and in relation to community law and order these matters are addressed in Part V.

56. In turn, as observed in Part V, the lack of cultural authority in many Aboriginal communities has been an important reason for the failure of the current by-law scheme under the *Aboriginal Communities Act 1979* (WA). See Part V, 'Factors Against the By-Law Scheme: Lack of cultural authority', above p 120.

57. Toohey J, *Aboriginal Customary Laws Reference – An Overview*, LRCWA, Project No 94, Background Paper No 5 (September 2004) Appendix 1, 28 (footnote omitted).

58. Sullivan as cited in Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future* (Sydney: Federation Press, 2003) 166.

59. Havemann P, 'Aboriginal peoples in Canada: Aspirations for distributive justice as distinct peoples (an interview with Paul Chartrand)', in Havemann P (ed) *Indigenous Peoples' Rights in Australia, Canada and New Zealand* (Auckland: Oxford University Press, 1999) 69.

values, norms and power structures on indigenous communities.⁶⁰

Larissa Behrendt is one of many Indigenous Australian commentators that see a need for structural change in the institutions that affect Aboriginal people to accommodate 'institutional pluralism'.⁶¹ While institutions may appear to be ideologically neutral, Behrendt argues that:

it is inevitable that the laws and institutions of society are constructed with the values of the dominant culture and that they produce unsatisfactory results, conflict, marginalisation and ostracism for those who find themselves challenging those values. This goes some of the way to explaining why 'Western' institutions often fail Indigenous people.⁶²

Roger McDonnell and Robert Depew warn against a romanticised notion of returning governance of Aboriginal communities to a traditional power structure simply because it must have worked in the past. They describe this as 'dangerously naïve' and argue that

it ignore[s] the massive amounts of information from the areas of justice, health and social services indicating just how comprehensively problematic and complex many contemporary Aboriginal communities are. It would also beg the question why, if they are in place in a sufficiently robust form, indigenous institutions and values are not having a more positive impact on the lives of those whose institutions and values they reflect.⁶³

This is a salient warning but on the other hand there is an important and well-recognised need to find what Stephen Cornell describes as a 'cultural match' between communities and the institutions that directly govern them. That is, for governing institutions to have any chance of success, they must reflect the values, and match the political culture, of the community they seek to govern.⁶⁴ It is this, Cornell argues, that gives governing institutions their legitimacy. In Cornell's view this means

designing governing institutions that match *indigenous* notions of how authority should be organized and

exercised. It means working with—not against—indigenous law and practice.⁶⁵

However, it must be remembered that the embrace of culture in the design, and indeed practice, of Indigenous governing institutions must take account of modern pressures upon Aboriginal people and the diversity of views in any given Aboriginal community. As McDonnell and Depew point out:

Aboriginal people today are just that, they are contemporaries who, quite apart from being the proud inheritors of distinct traditions, may have developed sensibilities with regard to gender equality, individual rights, and a host of other values that may be contrary or contradictory to that tradition. Furthermore no one can know in advance what that mix might be.⁶⁶

In many ways, these sentiments reflect the true nature of self-determination: that a people should have the freedom to 'determine their political status and freely pursue their economic, social and cultural development'.⁶⁷ Similar to the opinions expressed by many Indigenous Australians, the Canadian Royal Commission on Aboriginal People (RCAP) observed that many indigenous Canadians felt that systems of government which do not reflect traditional values of Indigenous peoples erode traditional authority structures, the importance of the family, and traditional consensual decision-making.⁶⁸ However, RCAP also pointed out that, when given the opportunity to design their own governing systems, many indigenous Canadians saw useful features in mainstream forms of government.

Aboriginal people, like other contemporary people, are constantly reworking their institutions to cope with new circumstances and demands. In doing so they freely borrow and adapt cultural traits that they find useful and appealing. It is not the heedless reproduction of outmoded practices that makes a vigorous tradition, but a strong connection with the living past.⁶⁹

RCAP also observed that 'the fact that some Aboriginal governments may resemble Canadian governments in their overt structure does not preclude their being

60. Ibid 67.

61. Behrendt L, *Achieving Social Justice: Indigenous rights and Australia's future* (Sydney: Federation Press, 2003) 131.

62. Ibid 67

63. McDonnell RR & Depew RC, 'Aboriginal Self-Government and Self-determination in Canada: A Critical Commentary' in Hylton JH (ed), *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1999) 357.

64. Cornell S, 'The Power and Importance of Indigenous Self-Governance: Research findings from the Harvard Project on American Indian Economic Development', presentation to the Building Effective Indigenous Governance Conference, Canberra (3 April 2002).

65. Ibid.

66. McDonnell RR & Depew RC, 'Aboriginal Self-Government and Self-determination in Canada: A Critical Commentary' in Hylton JH (ed), *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1999) 369.

67. *International Covenant on Civil and Political Rights* and *International Covenant on Economic Social and Cultural Rights*, Article 1.

68. Royal Commission on Aboriginal Peoples- Final Report, Volume 2: Restructuring the Relationship, 1.2 Traditions of Governance, 11.

69. Ibid 3.

animated by Aboriginal outlooks, values and practices'.⁷⁰ In other words, institutions of Aboriginal community governance may accommodate Aboriginal perspectives without necessarily being based entirely on Aboriginal values. The important point would appear to be that Aboriginal communities should be free to determine the design of their immediate governing institutions. Institutional design may differ widely amongst Aboriginal communities in response to their differing needs or cultural outlooks and the means by which government facilitates this process must be sufficiently flexible to accommodate this diversity.

Aboriginal Community Governance in Western Australia

Aboriginal Communities Act 1979

The *Aboriginal Communities Act 1979* (WA) ('the Act') is the existing system of Aboriginal community governance in Western Australia. As discussed in detail above in Part V,⁷¹ the Act was conceived primarily as a vehicle for the management of law and order issues within Aboriginal communities and was intended to operate in conjunction with a community court system presided over by Aboriginal Justices of the Peace. (As explained in Part V, this court system never eventuated.) The Act made provision for Aboriginal community councils to declare by-laws applying within designated community lands to regulate such matters as traffic, damage, alcohol consumption and supply, disorderly behaviour and admission to land.⁷² At the date of writing 25 Aboriginal communities, mainly situated in the Kimberley region, operate community by-law schemes under the Act.⁷³

Having reportedly evolved from the international law focus on Indigenous self-determination in the 1970s,

the Act was originally touted as providing some form of governing autonomy to Aboriginal communities.⁷⁴ However, it has been widely criticised for imposing non-Aboriginal governance structures upon Aboriginal communities that have, in some cases, complicated traditional kin relationships and undermined the traditional authority of Elders.⁷⁵ Indeed, apart from proposing by-laws to address certain forms of behaviour within community lands, there is no opportunity for genuine Aboriginal community governance: the Act imposes a governing structure upon a community (by way of a non-representative incorporated community council); prescribes the process for, and parameters of, community law-making; invests authority for enforcement in a non-Aboriginal authority; and stipulates the appropriate sanctions for breach of offences. In fact, the Act can only really be seen as an attempt to bring the general court and legal system into communities where a lack of police presence, abuse of alcohol and other matters had caused community order to disintegrate.⁷⁶ According to Patrick Dodson:

'Experimental' at its inception, it could be said [the Act] has never been taken seriously. Apart from some individual Magistrates, no-one has seriously acknowledged, enhanced or sponsored the legitimate right of Aboriginal people to develop self-management legal process programmes for their own communities.⁷⁷

Although the preamble of the Act is expressed in broad terms that might support its extension to wider governance matters,⁷⁸ in practice the Act has only ever been used as a tool for addressing criminal justice issues. In this respect, the 'experiment' can be said to have been singularly unsuccessful.⁷⁹ Problems with the current community by-laws scheme under the Act are canvassed in detail in Part V above, but in summary there have been significant issues with the enforcement of by-laws by police and wardens; the capacity

70. Ibid 22.

71. See Part V, 'Aboriginal Community Justice Mechanisms: The Western Australian Aboriginal Community By-Law Scheme', above pp 115–20.

72. *Aboriginal Communities Act 1979* (WA) s 7(1).

73. It is noted that although only 25 communities operate by-laws under the Act, there are many more communities that have expressed interest in being proclaimed under the Act. McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 1, July 1992) 6. McCallum notes (at 79) that there are considerable delays—up to 3 years in some cases—in processing a community's application for proclamation under the Act (the same was noted by an earlier review of the Act undertaken by John Hedges in 1985). The Commission understands that applications are currently on hold while a further review into the operation of the Act is undertaken by the Department of Indigenous Affairs. See: Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 August 2004, 5043 (Mr JC Kobelke, Minister for Indigenous Affairs).

74. Kamien T, 'Implementing Self-Government – An Examination of the *Aboriginal Communities Act 1979* (WA)' (1995) *Murdoch University E-Law Journal* [1].

75. See, for example, Kamien, *ibid* [3.4].

76. Certainly, the Act never purported to engage meaningfully with customary law. See: Commissioner Patrick Dodson, RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [9.3.4]; ALRC, *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986) [757].

77. Commissioner Patrick Dodson, RCIADIC, *Regional Report of Inquiry into Underlying Issues in Western Australia* (Vol. 1, 1991) [9.3].

78. The preamble of the Act reads 'An Act to assist certain Aboriginal communities to manage and control their community lands and for related purposes'. See also McCallum A, *Review of the Aboriginal Communities Act 1979* (WA) (Vol. 1, July 1992) 97.

79. The Lingiari Foundation, *The Munjurla Study: A Scoping, Profiling and Planning Process in Respect of the WA COAG Site Trial for the Purposes of Informing the Negotiation of a Comprehensive Regional Agreement* (April 2004), 117.

for breach of by-laws to contribute to the overrepresentation of Aboriginal people in the mainstream criminal justice system; the fact that by-laws have been established by communities (and approved by the Governor) that go beyond the delegated law-making powers contained in the enabling Act; that the by-law scheme creates an additional layer of law applicable only to Aboriginal communities; that community councils empowered under the Act are not always representative and are in some instances dysfunctional; and that by-laws are not always, as the Act envisaged, established in consultation with the community and are not necessarily reflective of traditional authority structures or customary law.

The Commission has proposed in Part V that the Act be repealed and replaced with a new Act – the ‘Aboriginal Communities and Community Justice Groups Act’.⁸⁰ The proposed Act will contain the means by which Aboriginal communities can enhance community control of their law and order issues; in particular by the establishment of community justice groups which seek to consolidate the cultural authority of Elders and offer a culturally appropriate, community-owned process for control of behaviour in the place of the current by-law scheme.

Ngaanyatjarraku Shire – An Example of Aboriginal Local Government

With a population of 1,708, Ngaanyatjarraku Shire takes in ten communities in the Gibson and Great Victoria Deserts (Warburton, Tjirrkarli, Jameson, Blackstone, Wingellina, Warakurna, Tjukurla, Wanarn, Patjarr and Giles) and is the only Aboriginal local governing body in Western Australia. Established in July 1993, Ngaanyatjarraku broke away from the Shire of Wiluna in an effort to improve service delivery to the people of the tri-border region.⁸¹ Currently Ngaanyatjarraku Shire provides a cross-section of local government services to most of its constituent communities including



litter and waste management, dog control, environmental health services, youth services, maintenance of recreation facilities, road maintenance, street lighting and building services (planning and development). Although a substantial improvement on the very limited services previously provided to the region by the Shire of Wiluna, Ngaanyatjarrku Shire acknowledges that it will take some time for the full range of local government services to be available to all communities in the region.⁸²

As a local governing body, the Shire of Ngaanyatjarraku is primarily funded by the federal government through the *Local Government (Financial Assistance) Act 1995* (Cth) as distributed by the state government's Local Government Grants Commission. In April 2005 the Shire's total operating revenue was recorded at just over \$5.1 million, with just \$165,000 of that amount being raised by rates levied on mining tenements and community leasehold land.⁸³

Funding Options for Aboriginal Local Governing Bodies in Western Australia

There are two types of local governing bodies recognised for the purposes of discrete federal funding under s 4(1) of the *Local Government (Financial Assistance) Act 1995* (Cth):

80. See Part V, Proposal 18, above p 140.

81. The Shire of Ngaanyatjarraku is located roughly where the borders of South Australia, Western Australia and the Northern Territory intersect. However, the Ngaanyatjarra lands are even more extensive and take in 250,000 square kilometres of Western Australia (or 3% of the Australian landmass) and cover parts of the adjoining shires of East Pilbara and Laverton. Shire of Ngaanyatjarrku, 'Lands', <<http://www.tjulyuru.com/lands.asp>>.

82. Shire of Ngaanyatjarraku, 'Shire Functions', <<http://www.tjulyuru.com/functions.asp>>.

83. Shire of Ngaanyatjarraku, 'Shire Statistics', <<http://www.tjulyuru.com/facts.asp>>.

- (a) a local governing body established by or under a law of a State, other than a body whose sole or principal function is to provide a particular service, such as the supply of electricity or water; or
- (b) a body declared by the Minister, on the advice of the relevant state Minister, by notice published in the *Gazette*, to be a local governing body for the purposes of [the *Local Government (Financial Assistance) Act 1995*].

Local governing bodies created under state law

Ngaanyatjarraku Shire was created under the *Local Government Act 1995* (WA) as a full local government, thereby coming under s 4(1)(a). As such it is subject to the rigorous reporting and auditing requirements of mainstream local governments. There are also a further 55 Aboriginal communities in Australia that are funded as full local governments under their respective state Acts. However, many of these are in Queensland which recently provided for Aboriginal Councils under the *Community Services (Aborigines) Act 1984* (Qld) to achieve full shire status under the *Local Government (Community Government Areas) Act 2004* (Qld).⁸⁴ Under this Act, Councils are automatically declared for the purposes of federal funding but not all of the rigorous legislative requirements imposed on mainstream local governments in Queensland apply. It is envisaged that, over a period of years and after implementation of a Community Governance Improvement Strategy (which addresses governing capacity, systems procedures and policy, financial management and service delivery in consultation with Aboriginal people and other stakeholders), Aboriginal community governments in Queensland will be brought under the mainstream *Local Government Act 1993* (Qld) with all the rights and responsibilities that that recognition brings. It should be noted, however, that the Queensland response specifically applies non-Indigenous or Western models of governance to Indigenous communities, although there is some flexibility for unique institutional development such as in the area of electing councillors.

The Northern Territory has an operating system for Aboriginal community governance that is not dissimilar to the new Queensland scheme. Community Governing Councils (CGCs) are created under the *Local Government Act 1993* (NT) and have the same functions and powers (including by-law making powers) as local government councils but are much smaller in size. They are also subject to the same regulatory requirements as local governments, however there is some freedom for self-organisation by way of a 'scheme' agreed by the community and approved by the Chief Minister that lays out such matters as eligibility to vote, council procedures and determination of functions. The CGC structure is used most frequently by remote Indigenous communities that are unable to rely on nearby towns for facilities or services.⁸⁵ There are 30 such councils in the Northern Territory.

'Declared' local governing bodies

As mentioned above, an Aboriginal (or any other) community may be declared a local governing body by the Minister under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) for the purpose of securing discrete federal funding. Although this option has never been used in Western Australia, there are 36 Aboriginal communities that are declared for the purposes of discrete funding elsewhere in Australia.⁸⁶ 'Declared bodies' are treated as local governments for the purposes of grant allocation even though they are unlikely to have the same legislative requirements as local governments and are not created under state Local Government Acts. In the Northern Territory 28 community incorporated associations are declared as local governing bodies for the purposes of attracting federal funding. Although these incorporated associations (or community councils) do not have the by-law making power of a local government, they do have full decision-making power and are able to fund their own service provision (through state and federal grants and limited revenue raising) and provide employment for their people. In addition, the declared local governing body structure gives communities a greater degree of autonomy from the Northern Territory government than under the CGC model.⁸⁷

84. The *Local Government (Community Government Areas) Act 2004* and Community Governance Improvement Strategy came about as a result of the 2001 Cape York Justice Study which highlighted specific justice problems (in particular, alcohol and authority problems) in Aboriginal communities. Responses to the consequent green paper placed a spotlight on issues of equality in service provision for Aboriginal communities.

85. For further discussion see Way F & Beckett S, 'Landholding and Governance Structures under Australian Land Rights Legislation', Australian Research Council Collaborative Research Project on Governance Structures for Indigenous Australians, Discussion Paper No 4 (undated). See also Local Government Association of the Northern Territory, *Annual Report 2003–2004* (2004); available on <<http://www.lgant.nt.gov.au>>.

86. Of the 36 declared local governing bodies, Northern Territory has 28, New South Wales has two, Victoria has one and South Australia has six.

87. Way F & Beckett S, 'Landholding and Governance Structures under Australian Land Rights Legislation', Australian Research Council Collaborative Research Project on Governance Structures for Indigenous Australians, Discussion Paper No 4 (undated).

Regionalisation of Aboriginal Governance

Despite the relative autonomy provided by the various Northern Territory governance structures, many small local councils are failing and many have developed a 'dependency on resident non-Aboriginal staff and government agencies for their survival'.⁸⁸ Like Western Australia and the other states, the Northern Territory is also experiencing significant problems with service provision to Aboriginal communities and entrenched Indigenous disadvantage. For these reasons, and to rationalise the large number of very small local governing bodies in the Northern Territory and avoid duplication of structures where possible, the government has begun to advocate a move toward regional governance.⁸⁹ The new regional bodies will subsume a number of CGCs and small 'declared' community councils and bring greater power to the table to negotiate regional partnership agreements with government and service providers and facilitate economies of scale. It is also considered that regional governments will provide greater opportunities for attracting and retaining professional staff.⁹⁰ Eventually, it is understood that the smaller councils and community governing structures will be abandoned.⁹¹

Aboriginal Regional Governance in Western Australia

The abolition of ATSIC in March 2005 has created a new imperative for Aboriginal governance at all levels. Under the new Commonwealth arrangements for Indigenous affairs the Australian government has introduced a 'whole-of-government' approach to delivering services to Aboriginal people. Part of this new approach involves the establishment of multi-agency Indigenous Coordinating Centres in former ATSIC regions to oversee partnership agreements between communities and the Commonwealth government and to integrate services provided by all levels of

government to Aboriginal communities. Key to the ultimate success of the new arrangements is the establishment of a network of regional representative organisations 'to ensure that local needs and priorities are understood'.⁹²

A Regional Governance Exemplar: Kullarri Regional Indigenous Body

The west Kimberley's Kullarri Regional Indigenous Body (KRIB) is one of the first Western Australian regional representative structures to emerge following the demise of ATSIC. In fact negotiations for the establishment of KRIB predated ATSIC's abolition by some 12 years. In this sense, KRIB can be seen as an exemplar because it is a 'self-identifying' and 'self-organising' structure that has emerged from within the community itself. In other words, it is the product of true community participation, rather than mere consultation.

The 'four ward model'

Over a period of many years a number of governance models were considered by the people of the Kullarri region in an effort to improve equality of service delivery to west Kimberley communities. In 2002 the 'four ward model' was selected as a governing structure that best reflected the 'self-identified cultural and local representation at the regional level'.⁹³ The four ward model is comprised of 'four discrete ethnographic areas'⁹⁴ which select representatives to form ward councils. Each ward council then selects three representatives to sit on KRIB, the regional body.

An important aspect of the KRIB model is that the delineation of the four wards was not imposed upon the constituent communities by external authorities; rather, it has emerged as a result of how local Aboriginal people view the region. Each ward has needs and interests that may be quite distinct from the others. For example, the South Ward, which is comprised

88. Northern Territory Government, Department of Community Development, Sport and Cultural Affairs, *Building Stronger Regions – Stronger Futures* (2003) 11.

89. Ibid.

90. Smith DE, 'From Gove to Governance: Reshaping Indigenous Governance in the Northern Territory', Australian National University Centre for Aboriginal Policy Research, Discussion Paper No 265 (2004) 21.

91. Northern Territory Government, Department of Community Development, Sport and Cultural Affairs, *Building Stronger Regions – Stronger Futures* (2003) 11.

92. Australian Government, *New Arrangements in Indigenous Affairs* (updated ed., February 2005) 5.

93. Burdon Torzillo & Associates Pty Ltd, *Kullarri Regional Partnerships Project: Final Report*, prepared for Kullarri Regional CDEP Inc, Broome ICC and Kullarri Regional Indigenous Body (July 2005) 6.

94. Ibid 6. The wards are: North (Bard Jawi) Ward, comprising Lombardina, Djarindjin, One Arm Point and surrounding outstations; Central Ward, comprising Beagle Bay and surrounding outstations; Town Ward, comprising Broome and town reserves; and South Ward, comprising Bidyadanga and its surrounding area.

primarily of the geographically remote community of Bidyadanga, will have very different infrastructure and service delivery needs than that of the Town Ward which takes in the regional hub of Broome. While the communities and outstations comprising the Central Ward may have significantly different cultural views to those comprising the Bard Jawi Ward which occupies the north of the Kullarri region.⁹⁵

There is flexibility in the role that each ward plays in the overall regional representative structure and this role may vary over time.⁹⁶ For example, a ward may begin by identifying and communicating local ward issues, needs and interests to KRIB which undertakes to represent those interests in negotiations on regional policies and partnership agreements; but, the possibility exists that in time, a ward may separate from the regional council in a move towards self-sufficiency. Presumably, a functional ward wishing to separate from KRIB may also seek to be excised from its local government area and pursue discrete funding as an independent shire in the manner of Ngaanyatjaraku Shire or as a 'declared' local governing body under the *Local Government (Financial Assistance) Act 1995* (Cth).

Representation

Each ward has the power to determine the appropriate representation for their ward council:⁹⁷ KRIB's guiding principles require only that each ward has traditional owner representation. Ward councils will generally include representatives from each of the different communities or outstations making up the ward plus a separate traditional owner or native title group. Although gender balance is not expressly addressed by requiring equal male-female representation at the ward level, the voices of women are ensured by a non-ward seat on KRIB for the Kullarri Indigenous Women's Aboriginal Corporation.⁹⁸

As a result of this community-driven (rather than government imposed) representative arrangement, the governance structures in each ward are quite

different.⁹⁹ In fact, since the South Ward is a single community ward, it has decided not to establish a ward council at this time. Instead, the community and the separate traditional owner group are directly represented on KRIB.

The role of KRIB

KRIB's objectives remain focused to a degree on realising equality of service provision in the Kullarri region, but KRIB is not itself a service provider or funding body.¹⁰⁰ KRIB's role is to advocate for the interests of the region with one voice, to map a 30-year vision for the region, to negotiate partnership agreements and memoranda of understanding with government and service providers on mutually beneficial terms, and to develop governing capacity in the region. KRIB appears to be grounded in the notion of 'partnership' with government, communities, other Indigenous bodies and individuals. However, in this context, partnership is understood to refer to equality of relations between parties and not to mere consultation.

Exploiting existing expertise

Acknowledging the broad experience and specific expertise of the plethora of existing associations¹⁰¹ and other bodies in the Kullarri region, KRIB has developed the concept of 'theme teams' to advise and enhance participation in (and acceptance of) the new regional structure. Suggested theme teams include '[e]arly childhood development, education, economic development, communications, culture and arts, employment and training, governance and strategy, health, housing and infrastructure, justice, land and natural resources, women's issues, families and youth'.¹⁰² Theme teams are expected to maximise improved outcomes in the region by ensuring that existing forums, programs and expertise are exploited, that unnecessary duplication is avoided, that service provision and outcomes are monitored and that all relevant people are 'at the table' to ensure policy and program success.¹⁰³

95. In fact Burdon Torzillo notes that the view has been expressed by North Ward and Central Ward members that 'significant healing has commenced from the opportunity the Ward structure provides for diverse groups to get together': *ibid* 45.

96. *Ibid* 35.

97. Burdon Torzillo & Associates Pty Ltd, *Kullarri Regional Partnerships Project: Final Report*, prepared for Kullarri Regional CDEP Inc, Broome ICC and Kullarri Regional Indigenous Body (July 2005) 6.

98. *Ibid* 28.

99. *Ibid* 25.

100. *Ibid* 8. KRIB appears to have made a conscious decision not to be involved in service provision despite calls from regional Indigenous service providers to be service provider based. KRIB's ultimate decision to avoid service provision was supported by the need to ensure that the body remained independent of government and representative of the community: *ibid* 14.

101. It is noted that there are 130 corporations created under the *Aboriginal Councils and Association Act 1976* (Cth) in the Kullarri region: *ibid* 45.

102. *Ibid* 6.

103. *Ibid*.

Other Regional Representative Bodies in Western Australia

Although not all borne of the lengthy, 'self-emerging' and 'self-identifying' process that determined the Kullarri model, there are several other regional representative bodies in different stages of development in Western Australia. The more advanced of these include Wunan (east Kimberley), Yamatji (central west) and Ngaanyatjarraku (Warburton region).

Each region appears to be developing different structures to suit the needs and interests of regional players. For example, the proposed Yamatji Regional Assembly will have representatives from 12 organisations or communities representing specific issues including land, housing, health and justice.¹⁰⁴ The roles of the Assembly will include advising government of issues specific to the region, providing an interface between service providers and the community and monitoring and evaluating service delivery.¹⁰⁵ While the Ngaanyatjarraku Shire Council (the only existing discrete Aboriginal shire in Western Australia) is in the process of finalising a broad Regional Partnership Agreement with the state and federal governments to include whole-of-government engagement on service delivery and a strategic investment plan.¹⁰⁶

Reform of Aboriginal Community Governance in Western Australia

Need for Aboriginal Community Governance Reform

There is no doubt that there is a pressing need for Aboriginal community governance reform in Western Australia. The impetus for such reform primarily arises from the state of entrenched Indigenous disadvantage discussed in Part II of this paper and the law and order issues discussed at length in Part V. In considering the possibilities for reform of Aboriginal community governance in Western Australia, the Commission is mindful of the need to address the problems identified earlier in this Part, in particular:

- inequality of government service provision to Aboriginal communities;
- lack of Aboriginal participation in community governance;
- lack of community economic base;
- problems with recruitment and retention of staff;
- intra-community (family) feuding;
- dysfunction and law and order issues;
- breakdown of cultural authority; and
- inappropriate or externally imposed governing structures.

The Commission notes the enormous potential of regional governing structures, such as KRIB, to address many of these issues; however, the Commission recognises that there is still a need for effective governance at the community level. Indeed, the effectiveness of regional bodies will ultimately rely upon the 'health' and capacity of their constituent communities and their ability to interact with the relevant regional body.

Funding for Autonomy

The Commission is of the opinion that current options available for Aboriginal community governance in Western Australia are narrow and limiting. In particular, it is noted that there has been no attempt in Western Australia to exploit federal funding options for discrete Aboriginal communities as 'declared' local governing bodies. The Commission believes that this option may offer Aboriginal communities (in particular communities that are not being adequately provided for by current local governments) the opportunity to fund or negotiate their own service provision in a broadly autonomous environment.¹⁰⁷ In some cases, such funding may offer Aboriginal communities the prospect of enhancing their economic base by bringing employment to the community and its members. Of course, it must be acknowledged that such an option could only work in the most functional communities and will require significant initial support by government and preparatory programs to build local governing capacity. Nonetheless, it is an option that the Commission considers should be further explored in Western Australia.

104. Senator Amanda Vanstone, Minister for Immigration, Multicultural and Indigenous Affairs, *Minister Announces New Indigenous Representation Arrangements*, Media Statement (29 June 2005).

105. *Ibid.*

106. *Ibid.*

107. It is noted that this would probably require excision of the community lands from the current local government area; however, in many cases (in particular remote communities) this will not impact negatively on the community as current relations between local governing bodies and remote communities appear to be unworkable and Aboriginal-specific funding is not being routed to Aboriginal constituents.

Proposal 92

That the state government explore the possibility of accessing federal funding for discrete Aboriginal communities under s 4(1)(b) of the *Local Government (Financial Assistance) Act 1995* (Cth) with a view to offering this autonomous option to functional Aboriginal communities that are not currently well-served by their local governments.

Some Guiding Principles for Aboriginal Community Governance Reform

Before turning to examine the potential of a framework for Aboriginal community governance reform in Western Australia, it is useful to isolate some guiding principles from the discussion in this Part. The Commission has identified six key principles that should be applied by government in furthering the object of governance reform in Aboriginal communities.

1. Voluntariness

The process of establishing a new governance structure must be voluntarily undertaken by each Aboriginal community. Where significant underlying issues of feuding and consequent dysfunction exist in a community, governance structures formed as a result of external pressure will inevitably fail. In these cases the process of healing and building communities must be given priority.

2. Empowerment of communities by building capacity and devolving decision-making power

A significant problem with past approaches to facilitating community governance and government service delivery is that the communities themselves have generally not been involved in identifying and implementing local solutions and having the freedom to spend money in ways that will benefit them. Indigenous communities have come to consider themselves, and be considered by governments, as passive recipients of government programs. As a consequence the ability of Aboriginal people to make decisions affecting their own community has been considerably eroded. In order that communities are genuinely empowered, capacity building for good governance must be focused not only on leaders and organisations, but also on the community.

3. 'Downwards accountability' and flexible funding

Regardless of past attempts to deliver tailored service provision to Aboriginal communities one thing has remained constant: services have been delivered almost exclusively by white bureaucracy with policy goals and implementation strategies set by government. Even representative structures such as ATSIC, which put Aboriginal people into key decision-making roles, were required to account to government through institutions and practices that reflected values and beliefs of mainstream 'white' Australia. This has resulted in 'upwards accountability' to government in the expenditure of funding for service provision and an emphasis on process. It was noted earlier that a significant amount of any funding received to deliver services may be spent on complying with government accounting practices and audit requirements. In contrast, 'downwards accountability' involves accounting to the community for the expenditure of government money allocated for their benefit and emphasises outcomes for the people receiving the services.

4. Recognition of diversity and the need for flexibility

Just as Aboriginal communities are different, the method or structure of governance that works for each community will vary. A mistake that governments have made in the past in attempting to bring 'self-government' to Aboriginal communities is to impose a single inflexible governing structure upon all communities, regardless of capacity, community conflict, community aspirations, cultural considerations or geographic location. A diversity of models that are flexible enough to be responsive to local community needs and ways of self-organisation or decision-making must be offered to Aboriginal communities seeking to reform their governing structures. Preferably, the type of governing structure ultimately chosen will self-emerge and may be unique to that community.

5. Need for true community representation

Perhaps partly as a result of the colonial practice of moving disparate Aboriginal groups into reserves or designated areas, some Aboriginal communities are debilitated by feuding and this has adversely affected their governing institutions. In order to guard against factionalisation of governing institutions, it is the Commission's opinion that representation of all clan or family groups and a balance of gender representation

It is the Commission's opinion that the most important rule to observe in community governance reform is that the model of governance be developed by the community, rather than imposed on the community.

should be considered as the starting point for new governing structures. The Commission also considers that traditional owner groups should be represented on community governing councils.

6. Recognition that this process will take time

No matter what type of governing structure is ultimately determined for a community, the self-government experiment will fail if the community has chronic social problems that remain unaddressed. Issues such as family feuding, alcohol and solvent abuse, family violence and general dysfunction must all be independently addressed as part of the capacity building process before true community governance can succeed. Both the government and Aboriginal people must therefore recognise that the process of delivering greater governing autonomy to Aboriginal communities will, in some cases, take a significant amount of time.

A Basic Framework for Reform

The Commission is impressed by the self-identifying and self-organising governance structures emerging at the regional level and considers that the starting point for reform of community governance in Western Australia should be limited to a basic framework that can facilitate this approach at a community level. Although the guiding principles set out above should inform the process of reform, it is the Commission's opinion that the most important rule to observe in community governance reform is that the model of governance be *developed* by the community, rather than *imposed* on the community.¹⁰⁸

As noted earlier, the Commission has proposed in Part V that the *Aboriginal Communities Act 1979* (WA), which provides the current community governance structure, be abolished and that a new statute (the

'Aboriginal Communities and Community Justice Groups Act') be enacted to enable the establishment of Aboriginal community justice groups. The Commission believes that these representative, gender-balanced groups will answer many of the law and order issues in communities and will assist in healing community dysfunction and enhancing cultural authority and governing capacity. Importantly, the groups allow discrete communities to establish their own community rules and sanctions and enhance the opportunity for recognition of Aboriginal customary law.¹⁰⁹ The groups will also have a broader role to play in informing courts and justice bodies and in diverting Aboriginal people away from the criminal justice system.

The Commission believes that the proposed 'Aboriginal Communities and Community Justice Groups Act' may also be a suitable vehicle for establishing the basic framework for reform and recognition of forms of community governance in Western Australia. However, in view of the current state of flux in Indigenous affairs, both in Western Australia and in the country at large, the Commission is reluctant to move beyond a general proposal encouraging the facilitation of self-identifying and self-organising governance structures informed by the guiding principles set out above. In reaching this conclusion the Commission has also been influenced by the following factors:

- that the system of incorporation and accountability of Aboriginal community councils under the *Aboriginal Councils and Associations Act 1976* (Cth) is presently under review;¹¹⁰
- that the Department of Indigenous Affairs in Western Australia is in the process of examining the viability of the *Aboriginal Communities Act 1979* (WA) and the effectiveness of various community governance models in Western Australia;

108. The Commission notes that the same conclusion was reached by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Many Ways Forward: Report of the Inquiry into Capacity Building and Service Delivery in Indigenous Communities* (Canberra, June 2004) 128.

109. In some communities, particularly those where there is significant factionalisation in governing institutions, these community justice groups might take on a broader community governance role. For example, there is no limit to the types of matters that the community justice group may make rules about on behalf of the community. As mentioned in Part V, community rules may extend to traffic matters, control of dogs and waste disposal (typically the domain of a local government body) and negotiation with service providers (typically the domain of a community council).

110. A new Corporations (Aboriginal and Torres Strait Islander) Bill 2005 is currently before federal Parliament.

- that the important research of the Indigenous Community Governance Project at the Australian National University's Centre for Aboriginal Economic Policy Research—which is funded in part by the Western Australian government and which will ultimately inform the creation of new community governance structures in Western Australia—is ongoing;¹¹¹
- that government service provision to Aboriginal communities in Western Australia is being addressed at a whole-of-government level by dedicated programs and partnerships;¹¹²
- that governance capacity building programs are a current focus of governments and of new regional representative bodies;
- that the new regional representative bodies (which have emerged from a self-identifying and self-organising process) will be in a position to monitor and evaluate the delivery of government services to constituent communities and negotiate memoranda of understanding and service agreements on behalf of those communities; and
- that the Commission's proposal for community justice groups will, when implemented, assist in addressing underlying issues of community dysfunction, law and

order and lack of cultural authority that currently impede the governing capacity of many Aboriginal communities in Western Australia.

The Commission therefore proposes:

Proposal 93

That the starting point for reform of Aboriginal community governance in Western Australia be limited to a basic framework that can facilitate self-identifying and self-organising governance structures to emerge at a community level.

That reform of Aboriginal community governance in Western Australia be informed by the guiding principles of voluntariness; community empowerment and devolved decision-making power; 'downwards accountability'; flexibility in funding and institutional structure; and balanced clan and gender representation.¹¹³

That Aboriginal communities be free to develop or choose a model of governance that is appropriate for their needs rather than have such model imposed on them by government.

111. For details of the ANU CAEPR Indigenous Governance Project and access to its publications see: < <http://www.anu.edu.au/caepr/governance2.php>>.

112. As detailed above p 433.

113. These principles are discussed under 'Some Guiding principles for Aboriginal Community Governance Reform', above pp 436–37.